

The Backlash Against *PASH*: Legislative Attempts To Restrict Native Hawaiian Rights

I. INTRODUCTION

In 1995, the Hawai'i Supreme Court reaffirmed the preeminence of Hawaiian custom and usage in State law with its decision in *Public Access Shoreline Hawai'i v. Hawai'i County Planning Commission* ("*PASH*").¹ In what many view as a landmark decision, the court held that a public interest group with Native Hawaiian members had standing to participate in a county-level contested case hearing because Native Hawaiian interests are distinct from those of the public at large.² The court further held that land titles in Hawai'i confirm only a "limited property interest as compared with typical land patents governed by Western concepts of property" so that Native Hawaiians will retain rights with regard to undeveloped land, to pursue traditional activities.³

Certain large landowners, developers, and title insurance companies strongly objected to the *PASH* court's clarification of the scope and content of traditional and customary usage and mounted a backlash in a series of bills in the 1997 session of the Hawai'i Legislature. Some of these interests claimed that the court's decision interpreting Hawai'i's constitutional and statutory provisions for Native Hawaiian rights unduly encumbered landowners' private property interests.⁴ Specifically, they alleged that the rights of Native Hawaiians to access undeveloped land for various religious, subsistence, or cultural purposes "has led to difficulties in selling, buying, and

¹ 79 Hawai'i 425, 903 P.2d 1246 (1995), *cert. denied*, 116 S. Ct. 1559 (1996) (Mem.)[hereinafter *PASH*]. This case is discussed in detail in Part II.B, *infra*. The author added 'Okina, or glottal stops, to all Hawaiian words regardless of Bluebook format.

² *See id.* at 434, 903 P.2d at 1255 n.10. The term "Native Hawaiian," or *Kanaka Maoli*, as used in the context of this article, refers to individuals able to trace their ancestry to the peoples inhabiting the Hawaiian Islands prior to the arrival of Captain James Cook in 1778, regardless of blood quantum. Both the "N" and the "H" are capitalized (similar to "Native American") to signify that the indigenous people of Hawai'i have a status unique from other inhabitants of these islands.

³ *See id.* at 447, 903 P.2d at 1268.

⁴ *See generally* S. 8: Relating to Land Use, 19th Leg., 1st Reg. Sess. (Haw. 1997) [hereinafter SB 8]; H.R. 1920: Relating to Real Property, 19th Leg., 1st Reg. Sess. (Haw. 1997) [hereinafter HB 1920]. Draft copies, testimony, committee reports, and other information pertaining to bills from the Hawai'i State Legislature's 1997 session are located in the Legislative Reference Bureau Library at the Hawai'i State Capitol.

financing real property in the State of Hawai'i."⁵ Those interests also contended that the court's reaffirmation of Native Hawaiian rights created a state of "uncertainty"⁶ which led to "an immediate and direct negative impact on employment opportunities, personal income, and the economic and social welfare of all of Hawai'i's citizens."⁷

In the legislative hearings that followed, advocates and practitioners of Native Hawaiian traditions defended their rights on historical and legal grounds. Those countering the backlash explained that the protection of customary practices was and is necessary for the perpetuation of Hawaiian culture and lifestyles in an evolving society.⁸ This coalition asserted that the State constitutional and statutory provisions on Native Hawaiian rights had a historical basis in laws of the Hawaiian Kingdom that clearly reflected unique "background principles" of property in Hawai'i.⁹

This polarized disagreement over the content and extent of private property rights and uses in the islands exploded at the beginning of the 1997 legislative session. Political leaders introduced bills in both the Senate and the House of Representatives to regulate the exercise of traditional and customary uses.¹⁰ In the numerous hearings that ensued, all interests furiously debated the legality and limitations of State regulation of traditional and customary rights.

In an attempt to understand the intricacies of this debate, this Comment examines the fundamental differences in Western and Native Hawaiian property concepts and laws in Hawai'i as it relates to certain legislative proposals introduced in reaction to *PASH*. Parts II and III trace the legal development of Native Hawaiian rights from their historical evolution in the Kingdom of Hawai'i to their current codification in Article XII, Section 7 of the Hawai'i Constitution, and Hawai'i Revised Statutes ("HRS") sections 1-1 and 7-1. These sections also detail 137 years of judicial interpretation of these rights, from *Oni v. Meek*¹¹ in 1858 through *PASH* in 1995. Parts IV, V, and VI analyze the impetus for, and legal merits of, recent legislative attempts to

⁵ Haw. H.R. 1920 at 3.

⁶ *Id.*

⁷ *Id.*

⁸ See *Kalipi v. Hawaiian Trust Co.*, 66 Haw. 1, 8-9, 656 P.2d 745, 750 (1982) (recognizing that certain Native Hawaiian rights enable the "legal" practice of traditional activities in contemporary society). See generally testimony presented in opposition to SB 8 and HB 1920 for the arguments presented in support of traditional and customary uses.

⁹ See *PASH*, 79 Hawai'i at 451, 903 P.2d at 1272. It is important to note that all references to the "Hawaiian Kingdom" relate to Hawai'i under the rule of the Kamehameha and Kalakaua Dynasties (from 1785-1893). Prior to Kamehameha the Great's violent unification of the islands in 1785, *ali'i* (chief or chiefs) independently ruled islands or groupings thereof.

¹⁰ Although this Comment focuses on SB 8 and HB 1920, opponents of traditional and customary uses made other attempts to restrict these rights. See *infra* notes 172, 220.

¹¹ 2 Haw. 87 (1858). See discussion *infra* Part II.D.

regulate and re-define Native Hawaiian rights. This Comment concludes that the protected status of Native Hawaiian rights, as codified by the Legislature and interpreted by Hawai'i's judiciary, reflects unique Hawaiian social and legal relationships to real property. In light of this history, regulatory attempts by the legislature to circumvent its fundamental duty of respecting and accommodating traditional and customary practices violates current laws, undermines judicial integrity, and threatens Hawaiian culture.

II. THE LEGAL EVOLUTION OF NATIVE HAWAIIAN RIGHTS

In an attempt to better understand the backlash against *PASH* and disagreements over concepts of property in Hawai'i, this Comment provides an overview of Native Hawaiian rights. A summation of early Hawaiian land tenure principles, as well as the text and background of two statutory provisions, establishes the basis for early protections of traditional and customary uses in Hawai'i. Due to the myriad of cases interpreting various aspects of Native Hawaiian rights, this Comment also provides those decisions helpful in understanding the transition from early statutory protections to the 1978 constitutional provision.

A. *Concepts and Laws Relating to Land Tenure in Eighteenth Century Hawai'i*

Hawai'i's concepts and laws relating to land tenure are unique within United States law.¹² Much of this difference is attributable to the islands' distinct cultural and historical background.¹³ Hawai'i was an independent nation before the United States invaded the islands in 1893. Although the constitutional monarchy governing the Kingdom at the time of its illegal overthrow had imported principles *similar* to Western property law, those precepts were not a wholesale adoption of foreign law; rather, they were a unique blend of principles that evolved from Hawaiian customs and traditions.¹⁴

Prior to the documented arrival of Westerners to Hawaiian shores in 1778, the prevalent system of land tenure was an intricate and interdependent arrangement based on land use and control.¹⁵ Native Hawaiians lived in reciprocity with the *'aina* ("land base"), which they believed would sustain

¹² See *PASH*, 79 Hawai'i at 442-47, 903 P.2d at 1263-68. (distinguishing characteristics of property law in Hawai'i, due to the unique culture of the islands); *In re Ashford*, 50 Haw. 314, 316, 440 P.2d 76, 77 (1968).

¹³ See *Ashford*, 50 Haw. at 316, 440 P.2d at 77.

¹⁴ See *PASH*, 79 Hawai'i at 442-47, 903 P.2d at 1262-68.

¹⁵ See Maivan Lam, *The Imposition of Anglo-American Land Tenure Law on Hawaiians*, 23 J. LEGAL PLURALISM 103, 103-06 (1985)[hereinafter *Imposition*].

them if properly respected and cared for.¹⁶ The land was not commodified and could not be bought or owned.¹⁷ Under the pre-contact system, the 'aina was an embodiment of the *akua* (god or gods).¹⁸ As direct descendants of the *akua*, Native Hawaiians were responsible for utilizing the 'aina in ways that respected that relationship and benefited everyone.¹⁹

For the most part, the social structure and resource management of the *mokupuni* ("island") divided the 'aina like pieces of a pie; boundaries followed natural land divisions and stretched from the mountains down to the sea.²⁰ *Mokupuni* were divided into *moku* ("districts"), which in turn comprised *ahupua'a* ("land units").²¹ Each *ahupua'a* was further subdivided into 'ili ("individual farming parcels").²²

A socially stratified political system resembling a pyramid managed the various land divisions such that leadership positions increased in number as they decreased in rank.²³ At the top of the pyramid was the *akua*.²⁴ Below the *akua* was an *ali'i* class, headed by a *mo'i*.²⁵ The *mo'i* appointed loyal

¹⁶ See LILIKALA KAME'ELEIHIWA, NATIVE LAND AND FOREIGN DESIRES: PEHEA LA E PONO AI? 23-25 (1991). Native Hawaiian legend explains that the Hawaiian islands are the children of Papa, the Earthmother, and Wakea, the Skyfather. The same legend further explains that the Hawaiian race descended from Wakea and Ho'ohokukalani. *Kanaka Maoli* ("Native Hawaiians") therefore view the 'aina as an older sibling, and in accord with custom, believe that it is the duty of the elder sibling (the land) to care for and feed the younger sibling (the Hawaiian race), which in turn will respect and care for it. See DAVID MALO, HAWAIIAN ANTIQUITIES 241-44 (1961).

¹⁷ See Neil M. Levy, *Native Hawaiian Land Rights*, 63 CAL. L. REV. 848, 849 (1975).

¹⁸ See KAME'ELEIHIWA, *supra* note 16, at 26.

¹⁹ See *id.* The term "pre-contact" refers to any point in time prior to the arrival of Captain Cook in 1778.

²⁰ See *id.* at 27-28. *Ahupua'a* ("land districts") often included parts of the shore and/or sea. *Id.*

²¹ See P. NAHOA LUCAS, A DICTIONARY OF HAWAIIAN LEGAL LAND TERMS 77 (1995) [hereinafter DICTONARY]. According to Lucas, *moku* could be divided into *kalana* or *okana* (used interchangeably). See *id.* at 47, 81-82. These divisions were used selectively on only certain islands and usually comprised several *ahupua'a*. See *id.*

²² See MALO, *supra* note 16, at 16-18. Although *ahupua'a* were usually further subdivided into 'ili, there were exceptions, and some *ahupua'a* did not contain 'ili. LUCAS, DICTONARY *supra* note 21, at 4. There were also many different types of 'ili, i.e. 'ili *ku* ("'ili for the *mo'i*, not the *konohiki*"), 'ili *kupono* ("independent land division, not considered part of the *ahupua'a*"), 'ili *lele* ("parcels of land located in different parts of the *ahupua'a*, usually used for cultivating crops"). *Id.* at 40-41.

²³ Despite the stratification of society, Native Hawaiians viewed each other and the 'aina as part of one extended family. See KAME'ELEIHIWA, *supra* note 16, at 24-25.

²⁴ See *id.* at 26, 51. The term *akua* is also plural, as Hawaiians recognized more than one god or goddess. Physical embodiments of these *akua* were found in and on the earth (i.e., different kinds or plants or fishes). See MALO, *supra* note 16, at 81-87.

²⁵ See Melody K. MacKenzie, *Historical Background in NATIVE HAWAIIAN RIGHTS HANDBOOK* 3-4 (Melody K. MacKenzie ed., 1991). The term *mo'i* describes the highest ranking

followers within the ruling class (i.e. *ali'i 'ai moku*, *ali'i 'ai ahupua'a*, *konohiki*) to manage individual *ahupua'a* or *moku*.²⁶ These *ali'i* directed the *maka'ainana*, a class of resident tenants, in its care of the land.²⁷

Pre-contact society was largely communal in the sense that *maka'ainana* cultivated both marine and terrestrial resources of the *ahupua'a* to provide for their communities of relatives, both close and distant.²⁸ Although individuals were responsible for specific tasks, all members of society shared access to the natural resources necessary for survival.²⁹ Those who cultivated *kalo* ("taro") shared with others who tended the *loko'i'a* ("fishpond"), as well as those who raised *'uala* ("sweet potato"). Although individuals had their own house plots, they utilized and were responsible for other resources of the *ahupua'a* beyond the boundaries of their *kuleana*.³⁰ Specifically, *maka'ainana* enjoyed numerous rights, including access to public areas of an *ahupua'a*, lots for cultivating food, shared use of water for wet-land and dry-land crops, fishing, hunting, and gathering rights, as well as the right to erect structures for sleeping, cooking, eating, storage, and camping.³¹

Maka'ainana did not own the land they tended in a "fee simple" sense.³² Instead, they occupied land managed by an agent of the *mo'i* and paid taxes in the form of goods and/or labor.³³ This relationship was mutually beneficial

ali'i and may be defined as king, monarch, or sovereign. *Mo'i* often describes *ali'i* of the Kamehameha dynasty (i.e., Kamehameha I, Kamehameha II) and may not have been used until the 1800's. See SAMUEL H. ELBERT & MARY KAWENA PUKU'I, HAWAIIAN DICTIONARY 251 (1986).

²⁶ See Maivan Lam, *The Kuleana Act Revisited: The Survival of Traditional Hawaiian Commoner Rights in Land*, 64 WASH. L. REV. 233, 239-40 (1989) [hereinafter *Kuleana Act*]. Although *ali'i* managed various land divisions they did not "own" the land in a "fee simple" sense.

²⁷ See *id.* at 240-41.

²⁸ See MacKenzie, *supra* note 25, at 4.

²⁹ See KAME'ELEIHIWA, *supra* note 16, at 27.

³⁰ See Lam, *Kuleana Act*, *supra* note 26, at 242-44. *Kuleana* is literally translated as "responsibility." The term also describes the plot of land that *maka'ainana* lived on and were responsible for. See ELBERT AND PUKU'I, *supra* note 25, at 179.

³¹ See Lam, *Imposition*, *supra* note 15, at 106. Native Hawaiian oral history and tradition also provide evidence of customary use rights. For example, *hula* practitioners recited *He Kanaenae no Laka*, a forest chant in praise of *Laka* ("goddess of the *hula*"), when gathering grasses, herbs, and other forest greenery. See THE ECHO OF OUR SONG: CHANTS & POEMS OF THE HAWAIIANS 42-47 (Alfons L. Korm & Mary Kawena Puku'i eds. & trans., Univ. of Hawai'i Press 1973). Chants also provide documentation of *kahuna* (experts) gathering herbs for medicinal purposes. See JUNE GUTMERIS, NA PULE KAHIKO: ANCIENT HAWAIIAN PRAYERS 34 (1989).

³² See Levy, *supra* note 17, at 848-49.

³³ See Lam, *Imposition*, *supra* note 15, at 105-06. Despite some similarities, the pre-contact system of land tenure in Hawai'i differs from European feudalism in the sense that the *maka'ainana* were not tied to the land and did not owe military service to the *ali'i*. See *id.*

in the sense that the *mo'i* and his or her agents served as intermediaries for the common people by managing resources and making political decisions on their behalf.³⁴ In return, the *maka'ainana* provided for the basic needs of the *ali'i*.³⁵ Although either party could disregard its responsibilities, this was not a common occurrence.³⁶ If a *konohiki* was cruel or abusive, the *maka'ainana* were free to move to another district.³⁷ Conversely, an *ali'i* could evict or kill a *maka'ainana* who was not fulfilling his or her tasks.³⁸ Despite the fact that the *maka'ainana* did not own the land they occupied, they were "fixed residents"³⁹ and often had more security than the *ali'i*. If a new *ali'i* came to power as a result of natural death or warfare, control of the land was usually redistributed without displacing the *maka'ainana*.⁴⁰

B. The Imposition of Change

Subsequent to Captain Cook's arrival in 1778, Western influences heavily strained the pre-contact system of land tenure, placing an additional demand for goods on the *maka'ainana*. Foreign vessels sought provisions to stock their ships, and by 1810 a growing market for the export of sandalwood also developed.⁴¹ As these demands increased, communities became less able to meet their own needs because *ali'i* pressured the *maka'ainana* to gather sandalwood instead of maintaining the subsistence resources of the *ahupua'a*.⁴² The *ali'i*, meanwhile, accumulated growing debts by purchasing merchandise from merchants and traders on credit.⁴³ Most importantly, newly introduced diseases decimated the Native Hawaiian population; limited contact with bacteria and viruses common elsewhere increased the impact of foreign diseases on Hawaiians.⁴⁴

These factors are important because they created an interdependent facet in the relationship between *maka'ainana* and *ali'i* and discouraged exploitation. *See id.* This distinction is critical when applying feudal land concepts to Hawai'i.

³⁴ *See* MALO, *supra* note 16, at 52-63.

³⁵ *See id.*

³⁶ *See* Lam, *Kuleana Act*, *supra* note 26, at 240-42.

³⁷ *See id.*

³⁸ *See* MALO, *supra* note 16, at 57, 61. Likewise, *maka'ainana* could kill or replace cruel or abusive *ali'i*. *See* KAME'ELEIHIWA, *supra* note 16, at 26.

³⁹ MALO, *supra* note 16, at 61.

⁴⁰ *See* KAME'ELEIHIWA, *supra* note 16, at 51-52 (describing the politics of *Kalai'aina*, or "land redistribution").

⁴¹ *See* 1 RALPH S. KUYKENDALL, THE HAWAIIAN KINGDOM 82-86 (1938)[hereinafter KUYKENDALL, HAWAIIAN KINGDOM].

⁴² *See* KAME'ELEIHIWA, *supra* note 16, at 140.

⁴³ *See* KUYKENDALL, HAWAIIAN KINGDOM, *supra* note 41, at 90-91.

⁴⁴ *See* KAME'ELEIHIWA, *supra* note 16, at 140-41. Scholars disagree over the population of Hawai'i at the arrival of Captain James Cook. Lt. James King, one of Cook's crew members

While the native population struggled to maintain its health and way of life, foreign traders and merchants tried repeatedly to collect sandalwood debts. Eventually, warships from the note holders' home countries came to induce payment.⁴⁵ Foreign demands for land also mounted as newly arrived sailors, merchants, and missionaries sought parcels in lease or fee.⁴⁶ *Maka'ainana* were also evicted as *ali'i* traded or lost their lands to foreigners.⁴⁷

In attempt to quell the scramble for land and the disenfranchisement of the *maka'ainana*, Kamehameha III, the reigning *mo'i* also known as Kamehameha III, promulgated a Declaration of Rights in 1839 and Hawai'i's first Constitution in 1840.⁴⁸ The Declaration of Rights purported to protect the interests of all inhabitants of the Hawaiian Kingdom.⁴⁹ It provided protection for *maka'ainana* independent of the *ali'i*.⁵⁰ The Constitution of 1840 affirmed this guarantee and, with regard to land tenure, declared that the *mo'i* held all of the land in the islands in trust for the *ali'i* and *maka'ainana* and that no land could be conveyed without Kamehameha III's consent.⁵¹ Despite the promulgation of these laws, the disputes over land continued.

After the British seized control of the Kingdom for six months in 1843, Kamehameha III, under pressure from his foreign advisors, made another effort to secure the sovereignty of his nation and a land base for his people.⁵² In 1845, he created a Board of Commissioners to Quiet Land Titles to delineate the scope and outcome of all land claims.⁵³ After reviewing the land tenure

estimated the population as 500,000 (although he later amended that figure to 400,000). See DAVID STANNARD, *BEFORE THE HORROR: THE POPULATION OF HAWAII ON THE EVE OF WESTERN CONTACT* 3 (1989). Because of King's limited contact with the islands, especially the heavily populated wetland regions, later scholars utilizing more comprehensive sociological data, conservatively estimated a population of 800,000 to one million. See *id.* at 78. In 1823, a census completed by missionaries recorded 134,925 Native Hawaiians. See KAME'ELEIHIWA, *supra* note 16, at 81. By 1893, this figure dropped to roughly 40,000. See *id.* at 20.

⁴⁵ See KUYKENDALL, *HAWAIIAN KINGDOM*, *supra* note 41, at 91-92.

⁴⁶ See *id.* at 137.

⁴⁷ See Lam, *Imposition*, *supra* note 15, at 107.

⁴⁸ See Levy, *supra* note 17, at 851. Kamehameha III (or Kamehameha III) was a son of Kamehameha I, who consolidated political control over the Hawaiian islands in a single Kingdom in 1785. Kamehameha III ruled as *mo'i* from 1825-54, transforming the Kingdom into a constitutional monarchy and adopting private property rights in land. KAME'ELEIHIWA, *supra* note 16, at 31, 169-98. See generally *id.* at 205-06 (describing the social conditions surrounding laws passed in the 1840's).

⁴⁹ See LORRIN A. THURSTON, *THE FUNDAMENTAL LAW OF HAWAII* 1 (1904); See generally RALPH S. KUYKENDALL, *CONSTITUTIONS OF THE HAWAIIAN KINGDOM: A BRIEF HISTORY AND ANALYSIS* 8 (1940)[hereinafter KUYKENDALL, *CONSTITUTIONS*].

⁵⁰ See THURSTON, *supra* note 49, at 1.

⁵¹ See *id.* at 3.

⁵² See KAME'ELEIHIWA, *supra* note 16, at 184-86.

⁵³ See Commission to Quiet Land Titles; Awards, Patents; Etc. art IV, sec. 1, 2 REVISED LAWS OF HAWAII 2120 (1925)[hereinafter REV. LAWS].

system, the Commissioners instituted a process for settling all land claims in the Kingdom.⁵⁴ Despite the creation of this Commission, few claims were resolved until the interests of the *mo'i*, *ali'i*, and the *maka'ainana* were separated three years later.⁵⁵

After tremendous debate, the *mo'i*, his foreign advisors, and the Privy Council, made a collective decision to institute a system of fee simple ownership whereby the *mo'i* and *ali'i* would receive title to individual parcels.⁵⁶ In what became known as the Mahele of 1848, Kauikeaouli first reserved *'aina* for himself.⁵⁷ The *ali'i* then quit-claimed their interests in Kauikeaouli's properties, and he relinquished his interest in theirs.⁵⁸ *Ali'i* were also required to petition the Land Commission and pay a commutation fee in order to receive a title deed.⁵⁹ The *maka'ainana* did not participate directly in the Mahele; instead, Kauikeaouli gave 1.5 million acres to the government "subject always to the rights of native tenants."⁶⁰

Due in part to the continuing displacement of the *maka'ainana* even after the Mahele, Kauikeaouli instituted the Kuleana Act of 1850. Under this Act, *maka'ainana* could receive fee simple title to the lands they occupied and improved without a commutation fee.⁶¹ Section 7 of the Kuleana Act, also provided grantees with rights to gather, access, and obtain water from other parts of the *ahupua'a*.⁶² Kauikeaouli wrote and included section 7 due to his concern that a "little bit of land even with allodial title, if they [the people] be

⁵⁴ See JON CHINEN, *THE GREAT MAHELE: HAWAII'S LAND DIVISION OF 1848* 9, 12 (1958).

⁵⁵ See *id.* at 12.

⁵⁶ When Kauikeaouli reorganized the Kingdom into a constitutional monarchy, he made the Privy Council, formerly a council of *ali'i*, part of the executive ministry. The council acted in both an advisory and legislative capacity and consisted of five people: the governors of O'ahu, Maui, Hawai'i, Kaua'i, and one other member appointed by the *mo'i*. See KUYKENDALL, *HAWAIIAN KINGDOM*, *supra* note 41, at 263.

⁵⁷ See KAME'ELEIHIWA, *supra* note 16, at 210.

⁵⁸ See CHINEN, *supra* note 54, at 15-16.

⁵⁹ See Principles Adopted by the Land Commission, 2 REV. LAWS 2136 (1925).

⁶⁰ Crown, Government, and Fort Lands, Enumerated Etc.: An Act Relating to the Lands of His Majesty the King and the Government, 2 REV. LAWS 2174 (1925). Because initial land divisions in the Hawaiian Kingdom took place without "settling" the interests of *maka'ainana*, some individuals maintain that *Kanaka Maoli* able to trace their ancestry to subjects of the Hawaiian Kingdom prior to 1893, who did not participate in the Mahele of 1848 or Kuleana Act of 1850 or otherwise compromise their Kingdom citizenship, continue to hold an undivided interest in all land in the State of Hawai'i. Interview with Keanu Sai, Title Abstractor, *Perfect Title Company*, in Honolulu, Haw. (Apr. 9, 1997).

⁶¹ See Act of August 6, 1850, 2 REV. LAWS 2141 (1925). The Kuleana Act placed restrictions on the type and amount of land available to *maka'ainana*. See *id.*

⁶² See *id.* at 2142.

cut off from all other privileges, would be of very little value.”⁶³ This section thus provided *kuleana* occupants with a legal guarantee of unencumbered access within their *ahupua‘a* to utilize resources necessary to make their *kuleana* productive.⁶⁴ Although the *konohiki*’s permission was initially required before a tenant could exercise these rights, the legislature eliminated this condition during its next session due to “difficulties and complaints” of interference with the free exercise of *maka‘ainana* rights.⁶⁵

Despite these and other efforts to preserve the rights of Native Hawaiians and allow continued exercise of traditional and customary practices amidst the rapid changes in Hawaiian society, developing Western influences made ancestral lifestyles increasingly less viable.⁶⁶ Many Native Hawaiians, however, incorporated traditional and customary practices into their contemporary lifestyles and continue to perpetuate their culture in various ways. While some Hawaiians remain reliant on these practices for daily subsistence, others pursue traditional practices for purely recreational purposes.

C. Early Statutory Protection of Traditional and Customary Uses by the State of Hawai‘i

Two statutory provisions: HRS 1-1 and 7-1 partially enable the continued practice of traditional and customary uses, as discussed in Part I.B above. On the eve of statehood in 1959, the Admission Act made “[a]ll Territorial laws in force in the Territory of Hawai‘i at the time of its admission into the Union . . . continue in force in the State of Hawai‘i[.]”⁶⁷ Because the 1900 Organic Act similarly adopted the laws of the Hawaiian Kingdom as those of the

⁶³ *Kalipi v. Hawaiian Trust Company*, 66 Haw. 1, 7, 656 P.2d 745, 749 (1982)(quoting Privy Council Minutes of July 13, 1850).

⁶⁴ See Paul N. Lucas, *Access Rights*, in NATIVE HAWAIIAN RIGHTS HANDBOOK 214 (Melody K. MacKenzie, ed. 1991)[hereinafter *Access Rights*].

⁶⁵ See Act of July 11th, 1851, SESSION LAWS OF 1851 at 98-99. The prelude to the amendment stated in part, “WHEREAS, many difficulties and complaints have arisen, from the bad feeling existing on account of the *konohiki*’s forbidding the tenant’s on the lands enjoying the benefits that have been by law given them[.]” *Id.*

Maka‘ainana received only about 28,658 acres in awards out of 1.5 million, or a fraction of one percent of the total land area of the islands. See KAME‘ELEIHIWA, *supra* note 16, at 295.

⁶⁶ See *Kalipi*, 66 Haw. at 7, 656 P.2d at 749.

⁶⁷ The Admission Act, 48 U.S.C., Ch. 3 § 15 (1987). Section 15 of the Admission Act also allowed for the modification or repeal of Territorial laws. See *id.* The Territory adopted both HRS sections 1-1, 7-1 as codified.

Territory,⁶⁸ HRS 1-1 and 7-1 actually codify for the State various acts of the legislature of the Hawaiian Kingdom.

Hawai'i Revised Statutes section 1-1 provides that:

The common law of England, as ascertained by English and American decisions, is declared to be the common law of the State of Hawai'i in all cases, except as otherwise expressly provided by the Constitution or laws of the United States, or by the laws of the State, or fixed by Hawaiian judicial precedent, or *established by Hawaiian usage*; provided that no person shall be subject to criminal proceedings except as provided by the written laws of the United States or of the State.⁶⁹

This section codifies "custom" in Hawai'i, subordinating English and American common law to traditional and customary Hawaiian practices. In addition, it expressly accedes to judicial precedent of the Kingdom of Hawai'i. This substantial deference is due to the defining role that custom played in early Hawaiian law.⁷⁰

The State also provides a second statutory protection for traditional and customary practices. Hawai'i Revised Statutes section 7-1 declares that:

Where the landlords have obtained, or may hereafter obtain, allodial titles to their lands, the people on each of their lands shall not be deprived of the right to take firewood, house timber, aho cord, thatch, or ki leaf, from the land on which

⁶⁸ See An Act to Provide a Government for the Territory of Hawai'i (Organic Act) §§ 6, 10, 32, Act of Apr. 30, 1900, c. 339, 31 Stat. 141 (2 Supp. R.S. 1141)(1988).

⁶⁹ HAW. REV. STAT. § 1-1 (1995)(emphasis added).

⁷⁰ Although Polynesian voyagers settled in Hawai'i as early as 700 A.D., custom and usage governed the Kingdom almost exclusively until the promulgation of the Declaration of Rights in 1839. See 1 STATUTE LAWS OF HIS MAJESTY KAMEHAMEHA III, KING OF THE HAWAIIAN ISLANDS 3 (1845-46). As the transition to a more "Western" system of government continued, lawmakers codified oral traditions and laws in written form. On September 7, 1847, in section IV of *An Act to Organize the Judiciary Department of the Hawaiian Islands*, the Judiciary was free to adopt and apply common law as long as those principles were "not at conflict with the laws and usages of the Kingdom." 2 STATUTE LAWS OF HIS MAJESTY KAMEHAMEHA III, KING OF THE HAWAIIAN ISLANDS 5 (1847). When the Kingdom prepared a Civil Code in 1859, section 14 included "received usage" as a source of law. See CIVIL CODE ch. 3 § 14 (1859). On November 25, 1892, the Kingdom reorganized the Judiciary, repealing the relevant section in the 1859 Civil Code and adopting language similar to that found today in HAW. REV. STAT. § 1-1. See SESSION LAWS ch. LVII, § 5 (1892). The original language, however, referred to the common law and Constitution of the Hawaiian Islands, "or fixed by Hawaiian judicial precedent, or established by Hawaiian national usage[.]" *Id.* As explained above the Organic Act of 1900 made ch. LVII, § 5 applicable to the Territory. See *supra* note 68. When government officials reorganized and compiled the laws of the Territory in 1905, that statute became chapter 1, section 1 of the Revised Laws of Hawai'i. See REVISED LAWS OF HAW. ch. 1, § 1 (1905). The deference to Hawaiian usage since the origin of written law in Hawai'i provides a clear rationale for the present subordination of common law in Hawai'i to Hawaiian custom and usage.

they live, for their own private use, but they shall not have the right to take such articles to sell for profit. The people shall also have a right to drinking water, and running water, and the right of way. The springs of water, running water, and roads shall be free to all, on all lands granted in fee simple; provided that this shall not be applicable to wells and watercourses, which individuals have made for their own use.⁷¹

Hawai'i Revised Statutes section 7-1 makes section 7 of the Kuleana Act of 1850 applicable in the State of Hawai'i, therefore preserving the rights of *ahupua'a* tenants to gather enumerated items for personal use and to access other portions of the *ahupua'a*.⁷² This section also vests *ahupua'a* tenants with rights to adequate water for cultivating crops.

D. Early Judicial Interpretations of Native Hawaiian Rights

Oni v. Meek,⁷³ decided in 1858, was the first Hawai'i Supreme Court case to review the scope of rights under section 7 of the Kuleana Act, which is now codified as HRS 7-1.⁷⁴ Oni brought suit to recover the value of two horses pastured in the uplands of the *ahupua'a* of *Honouliuli*.⁷⁵ Dr. Meek held three leases giving him title to the uplands of the *ahupua'a*; he seized and sold Oni's horses while they were on his property.⁷⁶ Oni presented two legal bases for his right to pasture: (1) custom; and (2) an 1846 statutory provision—substantially similar to the Kuleana Act—providing tenants a limited right to pasture animals on lands held by the *kōnohiki* of an *ahupua'a*.⁷⁷

⁷¹ HAW. REV. STAT. § 7-1 (1995).

⁷² Chapter XXXIV, section 1477 of the Civil Code of 1859 included the Kuleana Act of 1850. The actual text of that statute (after the amendment repealing the *kōnohiki* permission provision) was identical to what is now HRS section 7-1, although the government listed it in various sections of the Revised Laws (see e.g., REV. LAW. 1925 § 576; REV. LAW. 1935 § 1694; REV. LAW. 1945 § 12901; REV. LAW. 1955 § 14-1). Regardless of its location, the legislative intent of the provision was clearly to protect the traditional and customary rights of *maka'ainana* within the private property regime. See discussion *supra* Part II.B.

⁷³ 2 Haw. 87 (1858).

⁷⁴ See Lucas, *Access Rights*, *supra* note 64, at 214. The Supreme Court of the Kingdom of Hawai'i (as opposed to the Supreme Court of the State of Hawai'i) decided *Oni*. The Supreme Court of the State of Hawai'i since clarified that decision in *Kalipi v. Hawaiian Trust Company*, 66 Haw. 1, 656 P.2d 745 (1982).

⁷⁵ See *Oni*, 2 Haw. at 87.

⁷⁶ See *id.* The last of a series of leases reserved certain portions of the uplands of Honouliuli. The defendant thus held title to all of the *mauka* ("upper") land in the *ahupua'a*, except that reserved in the last lease. *Id.* at 87-88.

⁷⁷ See *id.* at 89-92. The law passed on November 7, 1846, but it was never expressly repealed by the legislature; it provided:

The rights of the *hoa'aina* ["tenant"] in the land consist of his own taro patches, and all other places which he himself cultivates for his own use; and if he wish [sic.] to extend

The court rejected both arguments. First, the court ruled that the Kuleana Act of 1850 implicitly repealed earlier statutes governing the same areas of law.⁷⁸ Second, the court stated that "the custom contended for is so unreasonable, so uncertain and so repugnant to the spirit of the present laws, that it ought not to be sustained by judicial authority."⁷⁹ In dismissing Oni's argument that he received permission from Meek's predecessor-in-interest, the *konohiki*, and was continuing to maintain his rights and duties as a tenant, the court ruled that Oni's fee simple title freed him from any duty to labor as well as "the enjoyment of any right or privilege, and if he performs such labor it is neither by force of law or custom, but in fulfillment of a private contract."⁸⁰ The court finally held that the fee simple title claim of a *konohiki*, or lessee thereof, prevailed over all rights except those expressly reserved by section 7 of the Kuleana Act.⁸¹

Oni construed the Kuleana Act as the exclusive source of rights reserved to *ahupua'a* tenants.⁸² The court also relied heavily on Western property concepts, questioning custom as a basis for establishing traditional uses.⁸³ The Hawai'i Supreme Court later clarified this ruling after Article XII, Section 7 of Hawai'i's Constitution was adopted.⁸⁴

Although *Oni* dealt with the scope of rights provided by HRS 7-1, the court did not consider the issue of access under that statute until 1968.⁸⁵ In *Palama*

his cultivation on unoccupied parts, he has a right to do so. He has, also, rights in the grass land, if there be any under his care, and he may take grass for his own use or for sale, and may also take fuel and timber from the mountains for himself. He may also pasture his horse and cow and other animals on the land, but not in such numbers as to prevent the *konohiki* from pasturing his. He cannot make an agreement with others for the pasturage of their animals without the consent of his *konohiki*, and the Minister of the Interior.

Id. at 91-92. The court went on to state that:

[i]t was evidently the intention of the Legislature that whenever, in any case, a tract of land was divided between the several parties in interest, those rights which they had previously held in common, while their interests in land were undivided, should cease to be so held.

Id. at 93.

⁷⁸ See *id.* at 94.

⁷⁹ *Id.* at 90.

⁸⁰ *Id.*

⁸¹ See *id.* at 94-95.

⁸² See *id.* at 95-96.

⁸³ See *id.* at 90-91.

⁸⁴ In *Kalipi v. Hawaiian Trust Co.*, 66 Haw. 1, 656 P.2d 745 (1982), the court interpreted *Oni* as rejecting the validity of a particular exercise of custom (as opposed to custom in general). See *id.* at 11, 656 P.2d at 751. The court also noted that *Oni* did not restrict Native Hawaiian Rights to those enumerated in HRS section 7-1. See *id.*

⁸⁵ See Lucas, *Access Rights*, *supra* note 64, at 215.

v. Sheehan,⁸⁶ the Palamas filed a quiet title action to a sixty-acre parcel of land known as "Nomilo Pond" in the *ahupua'a* of Kalaheo, on Kaua'i.⁸⁷ The property contained an eighteen-acre fishpond, and the Sheehans claimed fishing rights in the pond and access to a *kuleana* they owned in the same *ahupua'a* based on Hawaiian rights, and necessity.⁸⁸

The trial court denied the Sheehan's fishing claim but granted them access across the Palama's property via an existing right of way.⁸⁹ On appeal, the Hawai'i Supreme Court affirmed the grant of access on the basis of both native rights and necessity.⁹⁰ The court noted that access was established as a matter of Native Hawaiian right because the Sheehan's predecessors-in-interest used the right of way to travel from their *kuleana* to taro patches located elsewhere in the *ahupua'a*.⁹¹ The court further observed that although a footpath initially provided access, the Palama's predecessor-in-interest expanded the trail to accommodate vehicles.⁹² The court thus allowed the Sheehans to use contemporary methods of transportation rather than limiting access to technology available at the time a right of way was established.

The Hawai'i Supreme Court also decided *In re Ashford*⁹³ in the same year that it handed down *Palama*. The Ashfords petitioned the land court to register title to beach-front parcels on the island of Moloka'i.⁹⁴ The Ashfords maintained that the seaward boundaries of the parcels were the mean high water mark.⁹⁵ The State alternatively claimed an additional twenty to thirty feet, explaining that the seaward boundary of beach front properties was the line at which vegetation began to grow, "in accordance with tradition, custom, and usage in old Hawai'i."⁹⁶

Noting that Hawai'i's land laws are unique, the court ruled on behalf of the State.⁹⁷ The court emphasized the importance of resolving contemporary disputes by considering historical data⁹⁸ and explicitly stated that "[p]roperty rights are determined by the law in existence at the time such rights are

⁸⁶ 50 Haw. 298, 440 P.2d 95 (1968).

⁸⁷ *See id.* at 298, 440 P.2d at 96.

⁸⁸ *See id.*

⁸⁹ *See id.* at 299, 440 P.2d at 97. This Comment does not address the issue of fishing rights in *Palama*.

⁹⁰ *See id.* at 301, 440 P.2d at 98.

⁹¹ *See id.* at 301, 440 P.2d at 97-98.

⁹² *See id.* at 303, 440 P.2d at 99.

⁹³ 50 Haw. 314, 440 P.2d 76 (1968).

⁹⁴ *See id.* at 314, 440 P.2d at 76.

⁹⁵ *See id.* at 314, 440 P.2d at 77.

⁹⁶ *Id.* at 315, 440 P.2d at 77. The Hawai'i Supreme Court ruled that during the Kingdom, the vegetation or debris line marked the seaward boundary of parcels. *See id.*

⁹⁷ *See id.* at 316, 440 P.2d at 77.

⁹⁸ *See id.*

vested."⁹⁹ The court thus evaluated the legitimacy of current claims, in part, based on the establishment of such a claim in "old Hawai'i."¹⁰⁰

In 1977, the court reinforced this position in *State of Hawai'i v. Zimring*.¹⁰¹ In this action, the State sought to quiet title to 7.9 acres of land added to the Zimring's parcel by a 1955 lava flow.¹⁰² The Zimrings opposed the State's claim on the grounds that Hawaiian usage prior to 1892 gave the owner of beach front land title to any additions created by lava flows.¹⁰³

After considering doctrines of Hawaiian custom and usage, the court held that "lava extensions vest when created in the people of Hawai'i, held in public trust by the government for the benefit, use and enjoyment of all the people."¹⁰⁴ The court rejected the Zimrings' attempt to establish a claim via

⁹⁹ *Id.* at 317, 440 P.2d at 78 (citations omitted).

¹⁰⁰ *Id.* at 315, 440 P.2d at 77. In 1973, the court again looked to Hawai'i's history to interpret Native Hawaiian rights in *McBryde Sugar Co. Ltd. v. Robinson*, 54 Haw. 174, 504 P.2d 1330 (1973), *adhered to on reh'g*, 55 Haw. 260, 517 P.2d 26 (1973), *appeal dismissed and cert. denied*, 417 U.S. 962 (1974), and *cert. denied*, *Robinson v. Hawai'i* 417 U.S. 976 (1974). In *McBryde*, two sugar companies in Hanapepe Valley on the island of Kaua'i were dueling over rights of water use. McBryde contested the amount of water Gay & Robinson diverted and sought a court order to determine the amount of each company's entitlement. After examining Hawaiian laws and customs relative to water management, the court held that the State (with a position analogous to the *mo'i*) had primary responsibility (or "ownership") for all of the water in Hawai'i. *See id.* at 199-200, 504 P.2d at 1345. Although individuals could acquire rights to use water, they could never own it. *See id.* at 200, 504 P.2d at 1345. The court also held that individuals could not transport water out of the watershed. *See id.* Although the decision was consistent with Hawaiian custom and tradition, the sugar companies claimed that the ruling controverted Western property law in Hawai'i and pursued a reversal in both the state and federal court system for almost twenty years. *See Williamson B.C. Chang, Unraveling Robinson v. Ariyoshi: Can Courts Take Property?*, 2 U. HAW. L. REV. 57 (1979)(detailing the litigation surrounding the *McBryde* decision in the state and federal courts). *See also* Williamson B.C. Chang, *Reversals of Fortune: The Hawai'i Supreme Court, the Memorandum Opinion, and the Realignment of Political Power in Post-statehood Hawai'i*, 14 U. HAW. L. REV. 17 (1992)(explaining how judges familiar with the culture and history of Hawai'i reinterpreted certain laws after statehood).

¹⁰¹ 52 Haw. 472, 479 P.2d 202 (1970)[hereinafter *Zimring I*], *rev'd*, 58 Haw. 106, 566 P.2d 725 (1977)[hereinafter *Zimring II*]. The court remanded this case and separate trials were conducted to decide various issues. This summation deals only with the 1977 Hawai'i Supreme Court decision as it relates to traditional and customary usage.

¹⁰² *See Zimring II*, 58 Haw. at 107, 566 P.2d at 727.

¹⁰³ *See id.* at 109, 566 P.2d at 728-29. Although the trial court found that "Hawaiian usage prior to 1892 gave the owner of land along the seashore, title to land created by volcanic eruption when the eruption destroyed the pre-existing seashore boundary and formed a new boundary along the sea," *id.* at 110, 566 P.2d at 729, the Hawai'i Supreme Court held that the Zimrings failed to present sufficient evidence to establish the custom. *See id.* at 116, 566 P.2d at 732.

¹⁰⁴ *Id.* at 121, 566 P.2d at 735.

the government's actions (Boundary Commission Report and Royal Patent).¹⁰⁵ Instead, it explained that traditional and customary uses do not hinge on government acceptance, but "must be based on actual practice[.]"¹⁰⁶ The court further observed that customary uses must be established in practice by November 25, 1892.¹⁰⁷

From 1838 to 1977, the Hawai'i Supreme Court interpreted HRS 1-1 and 7-1 as providing protections for traditional and customary uses, access, water, and gathering. In light of those decisions, current uses will qualify as protected traditional and customary rights if they: 1) were established in practice by 1892; 2) were actually exercised; and 3) have a basis in Hawaiian social and/or legal history. The court also expressed a willingness to incorporate the practice of traditional and customary uses into contemporary settings and to resolve disputes over whether or not a use was protected by looking at Hawaiian history.

III. THE CONSTITUTIONAL PROTECTIONS OF 1978

Despite the courts' recognition of traditional and customary rights, decisions from both the Kingdom of Hawai'i and the first twenty years of statehood limited the scope and content of Native Hawaiian rights. Although the State judiciary interpreted HRS 1-1 and 7-1 more broadly than Kingdom courts, rights of access, gathering, and water were modestly protected.¹⁰⁸ With the passage of a constitutional amendment in 1978, however, the court's affirmation and protection of Native Hawaiian rights increased notably.

A. The Constitutional Amendment

In 1978, the people of Hawai'i amended several provisions of the State Constitution in a Constitutional Convention. One hundred and two delegates, with a wide range of backgrounds and interests, took part in the

¹⁰⁵ See *id.* at 116-18, 556 P.2d at 732-33. After the Mahele, the Minister of the Interior for the Kingdom of Hawai'i issued Royal Patents for Land Commission Awards "upon payment of commutation by the awardee to the government, usually set at one-third the value of the unimproved land at the time of the award." *Id.* at 111, 556 P.2d at 730. In 1862, a Boundary Commission was statutorily created and empowered to issue reports determining the boundaries of land awarded in the Mahele and Kuleana Act, if the borders were not previously defined. See *id.* at 117-18, 556 P.2d at 733.

¹⁰⁶ *Id.* at 117, 556 P.2d at 733.

¹⁰⁷ See *id.* at 116, 556 P.2d at 732 n.11 (citing *State of Hawai'i v. Zimring*, 52 Haw. at 472, 479 P.2d at 202 (1970)). November 25, 1892, is the date on which the Hawaiian Kingdom passed the predecessor to HRS 1-1. See *supra* note 70.

¹⁰⁸ See discussion *supra* Part II.D.

proceedings.¹⁰⁹ Among the delegates existed a "genuine feeling that the Hawaiian culture and people were the host people of this state . . . and as such should be protected above and beyond others."¹¹⁰ In response to specific concerns about access and gathering rights, delegates made a concerted effort to raise current statutory protections to a constitutional level, thereby making traditional and customary uses an "inviolable right."¹¹¹ After being drafted in the Convention, and ratified by Hawai'i's voters, Article XII, Section 7 now mandates that:

The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights.¹¹²

This section places an affirmative duty on the State to respect and preserve traditional and customary rights. Delegates included Article XII, Section 7 to "preserve the small remaining vestiges of a quickly disappearing culture"¹¹³ by recognizing that traditional and customary rights are "personal rights . . . inherently held by Hawaiians and do not come with the land."¹¹⁴ The legislative history of the Amendment further delineates that, due to recent attempts to prevent practitioners from "following subsistence practices traditionally used by their ancestors,"¹¹⁵ it was necessary to "provide the State with power to protect these rights and to prevent any interference"¹¹⁶ with them. Delegates thus granted the State regulatory authority "to prevent possible abuse as well as interference with these rights."¹¹⁷ Since the adoption of Article XII, Section 7, the Hawai'i Supreme Court's interpretation of this provision significantly expanded the scope of protections for traditional and customary rights.

¹⁰⁹ Interview with Charlene Hoe, Delegate to the 1978 Constitutional Convention, in Honolulu, Haw. (Mar. 2, 1997).

¹¹⁰ *Id.*

¹¹¹ Telephone Interview with Sheri Broder, Attorney for the Hawaiian Affairs Committee in the 1978 Constitutional Convention (Apr. 22, 1997). Broder also explained that the amendment represented a "community-wide sentiment." *Id.* "People felt it was the time to start the process of beginning to provide justice for Native Hawaiians." *Id.*

¹¹² HAW. CONST. art. XII § 7.

¹¹³ STAND. COMM. REP. NO. 57, *reprinted in* 1 Proceedings of the Con. Convention of 1978, at 640 (1980).

¹¹⁴ *Id.* at 639-40.

¹¹⁵ *Id.* at 639.

¹¹⁶ *Id.*

¹¹⁷ *Id.* The State's ability to regulate traditional and customary uses is limited. *See* discussion *supra* Part V.C.

*B. Judicial Interpretation of Native Hawaiian Rights Subsequent To
Article XII, Section 7*

After the 1978 Constitutional Convention and the ratification of Article XII, Section 7, judicial interpretations of Native Hawaiian rights began to reflect the State's duty to affirm and protect traditional and customary uses. In *Kalipi v. Hawaiian Trust Company*,¹¹⁸ the plaintiff claimed rights of access and gathering under HRS 1-1 and 7-1, and a reservation in the deeds of title for certain lands on the island of Moloka'i.¹¹⁹ William Kalipi was a resident of the *ahupua'a* of Keawenui who owned a taro patch in Manawai and a house lot in East Ohia.¹²⁰ Although Kalipi was raised and had resided on the East Ohia lot, he was not living there when he filed suit.¹²¹ Yet, he claimed a right to continue his family tradition of accessing the lands of the defendants to gather various natural resources.¹²²

On appeal from a verdict in favor of the defendants, the Hawai'i Supreme Court declined to reverse the lower court's decision.¹²³ Although the court did not address Article XII, Section 7 directly, it acknowledged its constitutional obligation, finding that "it is this expression of policy which must guide our determinations."¹²⁴ The court further stated that despite the possibility of conflict, "any argument for the extinguishing of traditional rights based simply upon the possible inconsistency of purported native rights with our modern system of land tenure must fail."¹²⁵ The court thus examined the issues involving Native Hawaiian rights with deference to the State's duty to protect customary rights.

After noting that HRS 7-1 conferred rights of access, gathering, and water, the court went on to evaluate Kalipi's gathering rights under that section as one of first impression.¹²⁶ After reviewing the historical and legal aspects of the pre-contact system of land tenure, the court stated that section 7 of the Kuleana Act was included for use by the *maka'ainana* to "ensure the utilization and development of their lands."¹²⁷ Thus, "lawful occupants of the *ahupua'a* may, for the purposes of practicing Native Hawaiian customs and traditions, enter undeveloped lands within an *ahupua'a* to gather those items

¹¹⁸ 66 Haw. 1, 656 P.2d 745 (1982).

¹¹⁹ *See id.* at 4, 656 P.2d at 747.

¹²⁰ *See id.* at 3, 656 P.2d at 747.

¹²¹ *See id.*

¹²² *See id.* Some of the items gathered by Kalipi and his family were *ki*, bamboo, *kukui* nuts, *kiawe*, medicinal herbs and ferns. *See id.* at 4, 656 P.2d at 747.

¹²³ *See id.*

¹²⁴ *Id.* at 5, 656 P.2d at 748.

¹²⁵ *Id.* at 4, 656 P.2d at 748.

¹²⁶ *See id.* at 5, 656 P.2d at 748.

¹²⁷ *Id.* at 7, 656 P.2d at 749.

enumerated in the statute.”¹²⁸ Because Kalipi was not currently living in the *ahupua`a* in which he sought to exercise traditional and customary practices, the court did not enforce his rights.¹²⁹ The court finally acknowledged that gathering rights were necessary for the perpetuation of traditional and customary practices and “thus remain, to the extent provided in the statute, available to those who wish to continue those ways.”¹³⁰

In assessing Kalipi's claims under HRS 1-1, the court articulated a balancing test whereby the retention of a Hawaiian tradition is determined first by deciding if a custom has continued in a particular area, and second, by balancing the respective interests of the practitioner and harm to the landowner.¹³¹ In promulgating this test, the court rejected the defendant's claims that the only Native Hawaiian rights that remained in existence after the Mahele of 1848 were those specifically identified in HRS 7-1.¹³² The court also clarified *Oni* as a rejection of a particular custom, pasturage, as opposed to custom in general.¹³³ The court thus interpreted HRS 1-1 as “a vehicle for the continued existence of those customary rights which continued to be practiced and which worked no actual harm upon the recognized interests of others.”¹³⁴

In 1992, the Hawai'i Supreme Court directly addressed the range of protections provided by Article XII, Section 7, and HRS 7-1 in *Pele Defense Fund v. Paty*.¹³⁵ In *Pele*, members of a non-profit corporation (“PDF”) formed to perpetuate Hawaiian religion challenged as a breach of trust the State's exchange of 27,800 acres of ceded lands, including the Wao Kele 'O Puna Natural Area Reserve, on the island of Hawai'i, for 25,800 acres in Kahauale'a from Campbell Estate.¹³⁶ The members of Pele Defense Fund further claimed that denial of access for gathering and religious purposes by owner Campbell Estate, True Energy Geothermal, Corp., True Geothermal

¹²⁸ *Id.* at 7-8, 656 P.2d at 749. The court defined “lawful occupants” as individuals residing in the *ahupua`a* in which they seek to exercise traditional rights. *Id.* at 8, 656 P.2d at 749. The decision also acknowledged that the State has an interest in regulating gathering activities. *See id.*

¹²⁹ *See id.* at 9, 656 P.2d at 750.

¹³⁰ *Id.*

¹³¹ *See id.* at 10, 656 P.2d at 751.

¹³² *See id.* at 11-12, 656 P.2d at 751-52.

¹³³ *See id.* at 11, 656 P.2d at 751.

¹³⁴ *Id.* at 12, 656 P.2d at 752.

¹³⁵ 73 Haw. 578, 837 P.2d 1247 (1992), *cert. denied*, 113 S. Ct. 1277 (Mem.)(1993).

¹³⁶ *See id.* at 584, 837 P.2d at 1253. The mechanism for admitting Hawai'i as part of the United States, the Admission Act, established a trust for lands owned by the Kingdom of Hawai'i at the time of the overthrow. The Act named the State government administrator of that trust and the Native Hawaiian people one of five beneficiaries. *See id.* at 584-86, 837 P.2d at 1253-54.

Drilling Co., and Mid-Pacific Geothermal Inc. violated Article XII, Section 7.¹³⁷

On appeal from the Third Circuit's judgment in favor of the defendants, the Hawai'i Supreme Court reversed in part and affirmed in part.¹³⁸ After ruling that PDF's claim for breach of trust was barred,¹³⁹ the court turned its attention to the group's access and gathering rights.¹⁴⁰ The court first granted PDF standing under Article XII, Section 7, due to its purpose of encouraging Hawaiian religion.¹⁴¹ The court then proceeded to "further explicate" the scope of rights protected by that provision.¹⁴²

After reviewing *Kalipi*, the court noted that although PDF had constitutional and statutory basis for their claims similar to *Kalipi*, *Kalipi* had predicated his legal argument on land ownership, while PDF based its claim on custom and usage.¹⁴³ In examining the range of protection for customary rights the court reviewed the legislative history of Article XII, Section 7.¹⁴⁴ The court likewise noted that the provision sought "to protect the broadest possible spectrum of native rights"¹⁴⁵ and contemplated the extension of some traditional rights beyond the *ahupua'a*.¹⁴⁶

Pele acknowledged *Kalipi*'s mandate that a reviewing body determine the "precise nature and scope" of rights on a case-by-case basis.¹⁴⁷ After considering the traditional and customary access and gathering practices in Puna, the court held that "Native Hawaiian rights protected by Article XII, Section 7 may extend beyond the *ahupua'a* in which a Native Hawaiian resides where such rights have been customarily and traditionally exercised

¹³⁷ See *id.* at 584-85, 837 P.2d at 1253.

¹³⁸ See *id.* at 585, 837 P.2d at 1254. The decision was also remanded back to the Third Circuit to decide whether the landowners should be enjoined from denying PDF access. See *id.* Although proposed findings of fact were submitted by both parties, no decision was made as of November 6, 1998. Telephone Interview with Carl Christenson, Native Hawaiian Legal Corp., Attorneys for Pele Defense Fund (Nov. 6, 1998).

¹³⁹ See *Pele*, 73 Haw. at 590, 837 P.2d at 1256. Although the court found that PDF had standing to pursue a claim for breach of trust, it ruled that the statute of limitations, *res judicata*, and sovereign immunity barred the claim. See *id.*

¹⁴⁰ See *id.* at 613, 837 P.2d at 1268.

¹⁴¹ See *id.* at 614, 837 P.2d at 1268. The court ruled that PDF had standing to pursue its Article XII, Section 7 claim because: (1) its members included Native Hawaiians injured by their exclusion from the plaintiff's land; (2) such injuries are traceable to alleged violations of "*Kalipi* rights;" and (3) injunctive relief allowing Native Hawaiians to access undeveloped lands would remedy the injuries. See *id.* at 615-16, 837 P.2d at 1269.

¹⁴² See *id.* at 616, 837 P.2d at 1270.

¹⁴³ See *id.* at 618-19, 837 P.2d at 1271.

¹⁴⁴ See *id.* at 619-20, 837 P.2d at 1271-72.

¹⁴⁵ *Id.* at 619, 837 P.2d at 1271.

¹⁴⁶ See *id.* at 620, 837 P.2d at 1272.

¹⁴⁷ See *id.* at 619, 837 P.2d at 1271.

in this manner."¹⁴⁸ Although the court's holding in *Pele* was consistent with both traditional and contemporary laws and usage, it significantly expanded the legal protections for customary use rights.

In *Pele*, the court distinguished customary rights based on usage from those based on land ownership.¹⁴⁹ In evaluating use rights, the court examined the establishment of the custom in the context of the immediate community, rather than employing island-wide standards. The court also gave considerable weight to the mandate of Article XII, Section 7, electing to expand the scope of rights provided by *Kalipi* instead of prohibiting an established use.¹⁵⁰

Most recently, the court re-examined the scope of the statutory and constitutional protection of Native Hawaiian rights in *PASH*.¹⁵¹ The public interest group PASH and a Native Hawaiian Angel Pilago opposed the application of the Japanese-owned development corporation, Nansay, for a county-level Special Management Area ("SMA") Use Permit to develop a resort complex in the *ahupua'a* of Kohanaiki, on the island of Hawai'i.¹⁵² After holding a public hearing, the Hawai'i County Planning Commission refused to hold a contested case hearing for PASH and Pilago on the grounds that their interests were not "clearly distinguishable from that of the general public."¹⁵³ Instead, the Planning Commission denied their request and issued Nansay a SMA permit.¹⁵⁴ PASH challenged this ruling in the Third Circuit Court, which reversed the Commission's decision and remanded the case to the Planning Commission for a contested case hearing.¹⁵⁵ On appeal, the Intermediate Court of Appeals affirmed the circuit court decision with respect to PASH but reversed it with respect to Pilago.¹⁵⁶ After considering Nansay's appeal, the Hawai'i Supreme Court held that: 1) the circuit court had jurisdiction to consider the claims; 2) PASH had standing, so a contested case

¹⁴⁸ *Id.* at 620, 837 P.2d at 1272. This distinction from *Kalipi* stemmed from the nature of traditional practices in Puna as well as the scope of protection available under Article XII, Section 7. Although the court in *Kalipi* deferred to the policy of XII-7, it based its ruling on both HRS sections 1-1, 7-1. *See Kalipi*, 66 Haw. at 4-12, 656 P.2d at 747-52.

¹⁴⁹ *See Pele*, 73 Haw. at 618-19, 837 P.2d at 1271.

¹⁵⁰ *See id.* at 619, 837 P.2d at 1271.

¹⁵¹ 79 Hawai'i 425, 903 P.2d 1246 (1995).

¹⁵² *See id.* at 429, 903 P.2d at 1250.

¹⁵³ *Id.*

¹⁵⁴ *See id.* at 430, 903 P.2d at 1251.

¹⁵⁵ *See id.*

¹⁵⁶ *See id.* The appeals court reversed with respect to Pilago in spite of his "special" interest as a Native Hawaiian because he did not assert that he or other Hawaiians were engaging in protected activities, and thus failed to show that his interest was "personal." *Public Access Shoreline Hawai'i v. Hawai'i County Planning Comm'n*, 79 Hawai'i 246, 254, 900 P.2d 1313, 1321 (Haw. Ct. App. 1993). *See also PASH*, 79 Hawai'i at 430, 903 P.2d at 1251 (explanation in Hawai'i Supreme Court decision).

hearing should be held; and most importantly 3) Native Hawaiians retain rights to pursue traditional and customary activities, as land patents in Hawai'i confirm only a limited property interest, when compared with Western land patents/concepts of property.¹⁵⁷

Upon examining Article XII, Section 7, and HRS 1-1 and 7-1, the court observed that neither *Kalipi* or *Pele* precluded further inquiry into the extent that Native Hawaiian rights endured under State law.¹⁵⁸ After considering the practices at hand, the court ruled that Article XII, Section 7 is binding on administrative agencies-in that case, the Hawai'i County Planning Commission- and obligates those agencies to protect traditional and customary rights previously limited to state and county governments.¹⁵⁹

The court devoted considerable attention to the extent that HRS 1-1 preserved customary practices, noting that *Kalipi* specifically refused to decide the "ultimate scope" of traditional rights under that statute.¹⁶⁰ The court also distinguished the doctrine of custom in Hawai'i in several respects.¹⁶¹ First, contrary to the "time immemorial" standard used by English and American common law,¹⁶² traditional and customary practices in Hawai'i must be established in practice by November 25, 1892.¹⁶³

Second, the court articulated a three-point test for the doctrine of custom, requiring that a custom be *consistent when measured against other customs*, a practice be *certain in an objective sense*, and a traditional use be *exercised in a reasonable manner*.¹⁶⁴ Defining the reasonable use requirement, the court further explained that the balance leans in favor of establishing a use in the sense that "even if an acceptable rationale cannot be assigned, the custom is still recognized as long as there is no 'good legal reason' against it."¹⁶⁵

¹⁵⁷ See *PASH*, 79 Hawai'i at 425, 903 P.2d at 1246. The opinion in *PASH* is extraordinarily detailed. This section will not address all of the specifics of the decision (i.e., CZMA requirement, standing), and instead will focus on the sections relevant to traditional and customary uses under Article XII, Section 7, and HRS sections 1-1, 7-1.

¹⁵⁸ See *id.* at 438, 903 P.2d at 1259.

¹⁵⁹ See *id.* at 437, 903 P.2d at 1258.

¹⁶⁰ See *id.* at 439, 903 P.2d at 1260.

¹⁶¹ See *id.* at 447-51, 903 P.2d at 1268-72.

¹⁶² The "time immemorial" standard requires that a custom exist as far back as can be remembered. It is also described as "time whereof the memory of man is not to the contrary." BLACKS LAW DICTIONARY 1483 (6th ed. 1990).

¹⁶³ See *id.* at 447, 903 P.2d at 1268 (citations omitted). Under English and American common law, a custom "must appear to have existed from time immemorial; to be reasonable, to be certain, and not inconsistent with the laws of the land." *Oni v. Meek*, 2 Haw. 87, 90 (1858). See *supra* note 70 (development of HRS section 1-1). November 25, 1892 is the date on which the Hawaiian Kingdom passed the predecessor to HRS section 1-1. See *supra* note 70.

¹⁶⁴ See *PASH*, 79 Hawai'i at 447, 903 P.2d at 1268 n.39.

¹⁶⁵ *Id.*

Third, the court declined to limit the exercise of traditional and customary rights to individuals of Native Hawaiian descent. In a footnote, the court refused to decide whether descendants of citizens of the Kingdom of Hawai'i who were not of Native Hawaiian descent could assert rights protected by HRS 1-1.¹⁶⁶ The court also "expressly reserve[d] comment" on whether non-Hawaiian members of an *'ohana* could claim rights under Article XII, Section 7.¹⁶⁷

In addition to affirming *Kalipi* and *Pele*, *PASH* also highlighted several nuances in traditional and customary rights. The court expressly declined Nansay's invitation to overrule *Pele* and instead reaffirmed the decision, stating that the mandate of Article XII, Section 7, "normally associated with tenancy in an *ahupua'a*, may also apply to the exercise of rights beyond the physical boundaries of that particular *ahupua'a*."¹⁶⁸ The decision also recognized that Native Hawaiians have a unique claim to traditional and customary rights under HRS 1-1 and XII-7.¹⁶⁹ Yet, the court did not view this independent claim as foreclosing non-Hawaiians from exercising protected uses. Finally, the court's decision emphasized the historical basis for traditional and customary rights, the role of background principles of property in evaluating current uses, and the distinction between Hawaiian and English or American custom.

Since the addition of Article XII, Section 7 in 1978, the Hawai'i Supreme Court's decisions increasingly reflect the State's solemn duty to preserve Native Hawaiian rights. This renewed commitment to Hawaiian principles and uses is not an abstract creation. It reflects the judiciary's respect for the populace's effort to acknowledge Hawai'i's unique history by enshrining it in a constitutional provision.

IV. LEGISLATIVE ATTEMPTS TO REGULATE NATIVE HAWAIIAN RIGHTS

The court's interpretation of statutory and constitutional provisions relating to Native Hawaiian rights since *Oni* in 1858 significantly increased the scope of protection for traditional and customary uses. Cases decided since the adoption of Article XII, Section 7 of the Constitution in 1978 also exhibit the court's willingness to fulfill its duty to affirm and protect these rights. Because the United States Supreme Court declined to review *PASH*, the Hawai'i Supreme Court's interpretation of Article XII, Section 7, and of HRS 1-1 and 7-1, is final until it is modified by either the State or Federal Supreme

¹⁶⁶ See *id.* at 449, 903 P.2d at 1270 n.41.

¹⁶⁷ See *id.*

¹⁶⁸ *Id.* at 448, 903 P.2d at 1269.

¹⁶⁹ See *id.* at 449, 903 P.2d at 1270 ("Customary and traditional rights in these islands flow from Native Hawaiians' preexisting sovereignty.").

Court.¹⁷⁰ Despite this finality, dissidents attempted to limit the continued exercise of Native Hawaiian rights by promoting legislation that would restrict the implementation of the *PASH* decision. In light of the statutory and constitutional protections for traditional and customary practices, this Comment examines the legitimacy of recent regulatory attempts.

Opponents launched a backlash in a series of bills introduced during the 1997 legislative session to dilute the impact of recent court decisions. Legislators focused on the “uncertainty” created by *PASH* and presented bills to “remedy” the situation.¹⁷¹ Senate Bill 8 (“SB 8”) and House Bill 1920 (“HB 1920”) spearheaded these attempts to dilute the judiciary’s rulings in the legislature.¹⁷²

A. Overview of SB 8

Senator Randy Iwase (D-district 18: Wahiawa, Mililani) pre-filed SB 8 on January 15, 1997. This bill sought to provide private landowners with assurance of property title by instituting a process of determining and registering all traditional and customary uses exercised on a parcel of land.¹⁷³ Senate Bill 8 proposed that no legal exercise of traditional or customary practices could occur unless a practitioner was issued a “Certificate of Registration of Native Hawaiian Right.”¹⁷⁴ Individuals interested in continuing customary practices would have been required to initiate and complete a process of petitioning for and establishing any traditional and customary uses.

Senate Bill 8 attempted to amend HRS chapter 205, extending the authority of the Land Use Commission (“LUC” or “Commission”) to resolve all Native Hawaiian claims.¹⁷⁵ Under SB 8, practitioners would have borne the burden

¹⁷⁰ The United States Supreme Court denied a petition for writ of certiorari to review *PASH* on April 22, 1996. See *Public Access Shoreline Hawai‘i v. Hawai‘i County Planning Commission*, 116 S. Ct. 1559 (1996)(Mem.).

¹⁷¹ See HB 1920 (justifying legislative intervention to address the “uncertainty” caused by *PASH*).

¹⁷² See SB 8; HB 1920. Senate Bill 8 and HB 1920 were not the only bills introduced during the 1997 legislative session that affected or restricted traditional and customary rights. Senate Bill 668, for example, sought to expand HRS section 7, including protections for traditional and customary gathering rights. This analysis will focus on SB 8 and HB 1920, however, because they represent popular approaches to regulate traditional and customary rights.

¹⁷³ See SB 8.

¹⁷⁴ See *id.* § 205-B(a), at 4.

¹⁷⁵ See *id.* Hawai‘i Revised Statutes section 205 established a nine-member Land Use Commission (“LUC”), appointed by the Governor. See HAW. REV. STAT. § 205-1 (1995). The LUC must 1) establish standards for district boundaries (§ 205-2(a)), 2) approve all boundary amendments for parcels larger than 15 acres, see §§ 205-3.1(a), 205-4, 3) review special use

of establishing, by a clear preponderance of the evidence, that (1) they were descended from individuals that inhabited the Hawaiian islands prior to 1778 (via a genealogy chart), and (2) that the traditional and customary practice they wished to continue was established on the identified parcel of land prior to November 25, 1892, by the petitioner's ancestors, via documents or records.¹⁷⁶ Senate Bill 8 required supplementation of this information with the petitioner's name, address, list of lineal descendants, and a description of the land on which she or he sought to continue practicing.¹⁷⁷ The bill required that applicants file all information with the LUC.¹⁷⁸

Senate Bill 8 also specified that the Commission notify a landowner that it received a petition via certified mail or publication, within thirty days of filing.¹⁷⁹ The landowner could respond to the petition and request a contested case hearing within a reasonable period.¹⁸⁰ If the landowner responded accordingly, a contested case hearing would have been held in conformity with the Hawai'i Administrative Procedure Act.¹⁸¹ If the landowner failed to respond, the Commission could issue a certificate granting the practitioner access "over, across, or upon the undeveloped land"¹⁸² if the use was reasonable and would not "cause hardship to the landowner and pose an unreasonable restriction on the landowner's intended use of the property."¹⁸³

The Commission might, however, impose conditions on the practitioner to prevent "unreasonable activities that may interfere, impede, or hinder the private landowner's use or possession of the undeveloped land."¹⁸⁴ The LUC could also terminate or modify certificates upon the petition of the landowner and a showing that the use "caused hardship" or was an otherwise "unreasonable restriction."¹⁸⁵

permits for parcels larger than 15 acres, *see* § 205-6. The commission may also initiate boundary amendments to ensure conformity with the various state and county development and community plans. *See id.* § 205-18.

¹⁷⁶ *See* SB 8 § 205-B(b), at 4-5.

¹⁷⁷ *See id.* § 205-C(b), at 5-6.

¹⁷⁸ *See id.* § 205-A, at 2.

¹⁷⁹ *See id.* § 205-C(c)(1), at 6-7. The LUC must place the advertisement in a newspaper of general circulation for at least two successive weeks on the island on which the undeveloped land is located. *See id.* at 7.

¹⁸⁰ *See id.* § 205-C(c)(2), at 7.

¹⁸¹ *See id.* The Hawai'i Administrative Procedure Act ("HAPA") establishes minimal procedural requirements for all State and County administrative bodies when promulgating rules or adjudicating contested cases. *See* HAW. REV. STAT. § 91 (1995 & Supp. 1997). The Act also provides for the judicial review of final agency decisions or orders. *See id.* § 91-14.

¹⁸² SB 8 § 205-C(c)(2), at 7.

¹⁸³ *Id.* § 205-D(a), at 8.

¹⁸⁴ *Id.* § 205-B(d), at 5.

¹⁸⁵ *See id.* § 205-D(a), at 8. The modification/termination process resembled the petitioning process, but did not specify whether the landowner or practitioner bore the burden of proof. The

Moreover, the Commission would only consider petitions for parcels of "undeveloped land."¹⁸⁶ Senate Bill 8 limited this definition to property upon which no structure or improvement existed, and no grading, grubbing, or building permit was issued.¹⁸⁷ The bill also classified paths, walkways, and greenways as improvements, thus making parcels where they existed ineligible for traditional and customary uses.¹⁸⁸ If an individual currently exercised traditional or customary uses on lands that did not fall within SB 8's definition of undeveloped land, that usage was not eligible for registration, and therefore could not be legally continued.

After being introduced and having passed its first reading on January 15, 1997, the Speaker referred SB 8 to the Senate Committee on Water, Land, and Hawaiian Affairs.¹⁸⁹ Co-chairs for the Committee, Randy Iwase and Malama Solomon (D-district 1: Kohala, Kawaihae, Honoka'a, Laupahoehoe, Papai-kou), scheduled the bill for a hearing on February 4, 1997. Although nearly forty individuals submitted written testimony, an additional twenty arrived at the hearing to present oral testimony.¹⁹⁰ Several classes of high school students also attended and submitted petitions in opposition to SB 8.

Over 90% of the testimony presented at the hearing opposed the bill's passage. Of the individuals supporting SB 8, almost all mentioned the burden the *PASH* decision imposed on Hawai'i's landowners. Interestingly enough, only one large landowner, Estate of James Campbell, presented oral testimony in support of the bill. The remainder of the supporters represented development interests, title insurance firms, and construction companies.

A wide range of interests opposed the bill. Scholars and practitioners from the Native Hawaiian community presented vigorous opposition. Native Hawaiian rights lawyers, environmental lawyers, and law students also attended. Finally, non-Hawaiian citizens concerned about SB 8's negative effects on all of Hawai'i's residents also encouraged the senators to let the bill die in committee.

modification process also provided for a public hearing with the option of requesting a contested case hearing, if the certificate holder responded within a reasonable time. If a certificate holder failed to respond, the petitioner's rights were deemed modified or terminated. *See id.* § 205-D(c)(1-3), at 9-10.

¹⁸⁶ *See id.* § 205-B(a)(4), at 4. *See also id.* § 205(A), at 3-4.

¹⁸⁷ *See id.* § 205-A, at 3-4.

¹⁸⁸ *See id.* Senate Bill 8's requirements made it extraordinarily difficult to establish a use. For example, although the bill mandated that a practitioner establish continued use of a parcel, the existence of a path made the parcel "developed" and thus ineligible for traditional and customary uses.

¹⁸⁹ STATE OF HAWAII LEGISLATIVE REFERENCE BUREAU, 19TH LEGIS. SESS., ALL INFORMATION FOR A BILL (SB 8) 1 (Haw. 1997).

¹⁹⁰ The author witnessed SB 8 and HB 1920's proceedings as a legislative extern and participant in the committee hearings.

Due in part to the significant amount of testimony submitted, the co-chairs deferred action on SB 8. On Tuesday, February 11, 1997, Senator Iwase announced two amendments to the bill in Senate Draft One of SB 8. The first amendment added the Office of Hawaiian Affairs as a party to all contested case hearings in order to help determine what uses were traditional and customary. The second amendment allowed landowners and petitioners to make settlement agreements at any time during the registration process. In a unanimous vote, the Senate Committee on Water, Land, and Hawaiian Affairs passed SB 8 that afternoon, referring the bill to the Senate Committee on Ways and Means.¹⁹¹

While the bill was pending in Ways and Means, a new coalition of powerful Hawaiian interests formed in opposition to the bill.¹⁹² Hula practitioners concerned about the impact of regulatory efforts like SB 8 on Hawaiian culture and lifestyles came together as *'Ilio'ulaokalani*.¹⁹³ On February 25, 1997, the coalition held a twenty-four-hour vigil at the State Capitol to

¹⁹¹ The Senate Committee on Water, Land, and Hawaiian Affairs passed SB 8 with a vote of 4 ayes, and 5 ayes with reservations.

¹⁹² Telephone Interview with Victoria Holt-Takamine, *'Ilio'ulao kalani* (Apr. 24, 1997).

¹⁹³ See *id.* *'Ilio'ulaokalani* literally translates as "the Red Dog Of the Heavens." Yet, there are many different levels of translation and the name also refers to a type of cloud formation, "a kind of watch cloud that hovers over and keeps track of things." *Id.* *'Ilio'ulao kalani* is a coalition of *hula halau* ("hula schools") and their extended *'ohana* committed to preserving Hawaiian culture and traditions. Telephone Interviews with Victoria Holt-Takamine, *'Ilio'ulaokalani* (Apr. 24, and Aug. 13, 1997)(all information relating to *'Ilio'ulaokalani* was gathered in a series of interviews with Victoria Holt-Takamine). This unification of powerful local interests was created at the start of the 1997 legislative session in response to SB 8 and other legislation affecting Hawaiians and Hawaiian issues. Due in part to a lack of representation by and consideration for traditional and customary practitioners, about a dozen *kumu hula* from around Hawai'i gathered on O'ahu in February of 1997 to discuss several bills that threatened to further restrict Native Hawaiian culture and traditions. The coalition's founding members included island notables like Pua Kanahale, Robert Cazimero, Keali'i Reichel, and Victoria Holt-Takamine.

After the coalition's instrumental role in stopping SB 8, about a dozen "core members" continued to meet on a weekly basis. Realizing *'Ilio'ulaokalani*'s incredible potential to "promote Hawaiian culture and things that are Hawaiian," the coalition began hosting educational forums and continued tracking bills. *Id.* Having started with monetary donations from various *hula halau* and other Hawaiian organizations, the coalition continues to operate via grants and other contributions. *'Ilio'ulaokalani* remains active: it has a mailing list numbering over 1100 individuals and a calendar with events already scheduled for the year 2000. Future plans include fundraising, study groups, and informing and mobilizing voters for upcoming elections.

As *kumu hula* from around the islands keep in contact through *'Ilio'ulaokalani*, more and more groups are turning to the coalition for political and strategic support. In addition to providing direct input on issues, *'Ilio'ulaokalani* now serves as a network for community efforts around the islands. As the coalition supports actions to protect "things Hawaiian," they fulfill the legacy of their name by watching over and keeping track of things. See *id.*

demonstrate dissatisfaction with SB 8, urging the Ways and Means' co-chairs to let the bill die in committee.¹⁹⁴ On Wednesday, after the demonstrators refused to let Senators Iwase and Solomon explain their positions, Solomon killed the bill by dramatically ripping it to pieces in front of the crowd.¹⁹⁵ Some spectators were unimpressed by this display since Solomon voted in favor of SB 8 and was otherwise unwilling to stop the bill while it was in her committee.¹⁹⁶ Despite the fact that the legislature's attempt to enact SB 8 was short-lived, HB 1920 raised the same issues of customary rights.

B. Overview of HB 1920

Representative Calvin Say (D-district 18: St. Louis Heights, Palolo, Kaimuki) introduced HB 1920 on January 24, 1997. The explicit purpose of the bill was to respond to recent Hawai'i Supreme Court decisions that "dramatically affected the nature of real property in Hawai'i."¹⁹⁷ Like SB 8, HB 1920 asserted that the court's affirmation of traditional and customary rights clouded title and limited landowners' ability to use their property.¹⁹⁸ The bill further explained that the present uncertainty of land titles and property rights "poses a serious threat to the State's economic and social well-being."¹⁹⁹ House Bill 1920 sought to exercise the State's authority under Article XII, Section 7 of the state constitution to "clarify and regulate" the practice of traditional and customary uses.²⁰⁰

Instead of establishing a registration process, HB 1920 created a declaratory cause of action that could be initiated in circuit court to "determine the nature and extent of customary and traditional practices in land."²⁰¹ Both landowners and petitioners were eligible to institute such actions.²⁰² Finally, any suit brought under HB 1920 would have had preference over all other civil actions.²⁰³

Petitions filed by practitioners required the same types of evidence as SB 8: 1) name and address; 2) documentation proving that the petitioner descended from individuals inhabiting the Hawaiian islands prior to 1778, via genealogy chart; 3) evidence establishing that the petitioner was lawfully

¹⁹⁴ *See id.*

¹⁹⁵ *See id.*

¹⁹⁶ *See id.*

¹⁹⁷ HB 1920, Section 1, at 1.

¹⁹⁸ *See id.* Section 1, at 1-4.

¹⁹⁹ *Id.* Section 1, at 2.

²⁰⁰ *See id.* Section 1, at 3-4.

²⁰¹ *See id.* Section 2, § 3, at 6.

²⁰² *See id.*

²⁰³ *See id.* Section 2, § 3, at 7.

occupying-as opposed to temporarily residing in- an *ahupua'a*; 4) a detailed description of the practice and areas utilized, including tax map parcel, and owner; and 5) written or other evidence showing that the practice "pre-existed and was not terminated by the Mahele of 1848, continued to be exercised as of November 25, 1892, and has been customarily exercised by Native Hawaiians on the land identified."²⁰⁴ Petitions filed by landowners required: 1) name and address; 2) a specific and detailed description of the land (including tax map parcel/s); and 3) identification of all potential or actual persons eligible to claim a right to exercise traditional and customary practices in the land.²⁰⁵

Under HB 1920, after the judge issued a summons, potential claimants as well as known claimants who, after due diligence could not be served, could have been served by publication.²⁰⁶ The bill required that notice be published in an English language newspaper of general circulation in the circuit where the action was filed, once a week for at least four weeks.²⁰⁷ House Bill 1920 also required posting a copy of the summons on the land involved in the litigation.²⁰⁸

The bill also empowered judges to issue default judgments against all individuals who failed to respond to the summons.²⁰⁹ Otherwise the judge could schedule trials where either party contested the petition.²¹⁰ Individuals claiming traditional and customary practices bore the burden of establishing their claim by a preponderance of the evidence.²¹¹ Practitioners had to affirmatively demonstrate that their practice was "reasonable" and would not result in "actual harm" to other interests, in addition to substantiating the elements of their petition.²¹²

At the conclusion of this process, the bills charged the courts with determining the "nature and extent," if any, of customary and traditional practices.²¹³ House Bill 1920 further authorized courts to issue decrees with

²⁰⁴ See *id.* Section 2, § 2-4, at 4-9.

²⁰⁵ See *id.* Section 2, § 4(b)(1-3), at 8. In all documents provided by both practitioners and landowners HB 1920 also required that, to the best of the person's knowledge, the information provided was true. See *id.* Section 2, § 4(c), at 8-9.

²⁰⁶ See *id.* Section 2, § 5(b), at 8-9.

²⁰⁷ See *id.* Section 2, § 5(b), at 9-10.

²⁰⁸ See *id.* Section 2, § 5(b), at 10.

²⁰⁹ See *id.* Section 2, § 5(c), at 10.

²¹⁰ See *id.* Section 2, § 6, at 10-11.

²¹¹ See *id.* Section 2, § 7, at 11.

²¹² See *id.*

²¹³ See *id.* Section 2, § 8, at 12.

the effect of a final judgment.²¹⁴ The court could also impose conditions on existing uses, when the decree was issued, or in the future.²¹⁵

House Bill 1920 additionally made certain types of land unavailable for traditional and customary uses. These lands included: 1) all land zoned urban; 2) physically altered land, or parcels improved by grading, grubbing, landscaping, or agricultural activities; 3) land covered by quiet title; and 4) land registered pursuant to HRS chapter 501.²¹⁶

Finally, HB 1920 relieved State and County agencies of their duty to consider the impact of their actions on traditional and customary rights. Although the bill purported not to affect the proceedings of any agency,²¹⁷ the bill provided that agencies fulfilled their obligation to protect traditional and customary uses under Article XII, Section 7 of Hawai'i's Constitution if they exercised authority subject to customs "subsequently established or proceeding under this chapter."²¹⁸ The bill explained that if an agency exercised discretionary authorization or granted a permit subject to traditional and customary practices, as established, or being decided under HB 1920, the agency fulfilled its constitutional duty to protect such rights and did not have to independently review the proposals impact on tradition.²¹⁹

²¹⁴ See *id.*

²¹⁵ See *id.* House Bill 1920, unlike SB 8, required that landowners demonstrate a cause for modification of existing rights by a preponderance of the evidence.

²¹⁶ See *id.* Section 2, § 11, at 14-15. An individual may institute a Quiet Title action, codified as HRS section 669, to establish legal title to parcels of five acres or less, where the person seeking title was in adverse possession for at least twenty years. See HAW. REV. STAT. § 669-1 (1995). Hawai'i Revised Statutes section 501 established a Land Court with the "exclusive original jurisdiction of all applications for the registration of title to land and easements or rights in land held and possessed in fee simple within the State[.]" HAW. REV. STAT. § 501-1 (1993). Grubbing is part of the land clearing process to prepare for development and usually involves removing trees, shrubs, or bushes. Telephone interview with Wilford Kiyotoki, Engineer, *City and County of Honolulu Dept. of Public Works* (Jan. 6, 1998).

²¹⁷ See HB 1920 Section 2, § 10, at 14.

²¹⁸ See *id.*

²¹⁹ See *id.* If passed, HB 1920 would place all responsibility for settling traditional and customary uses with the circuit courts, allowing agencies to act without independently considering the effect of their actions on Hawaiian traditions (if they acknowledged claims proceeding or settled pursuant to the bill). In light of the Hawai'i Supreme Court's holding in *PASH* that State agencies (as opposed to just the State government) are obligated to uphold Article XII, Section 7, HB 1920 blatantly attempted to circumvent the court's interpretation of the Constitution by removing the affirmative burden placed on State agencies. See *Public Access Shoreline Hawai'i v. Hawai'i County Planning Comm'n*, 79 Hawai'i 425, 451, 903 P.2d 1246, 1272 (1995).

Section 2, § 11 of the bill, exempting certain lands from customary rights, also worked against the preservation of traditional and customary rights. House Bill 1920 prohibited the exercise of traditional and customary uses on fully developed land. See HB 1920 Section 2, § 11(2), at 15. Therefore, the bill did not sanction customary uses on any parcel where "the

After being introduced and having passed its first reading, the Speaker assigned HB 1920 to the House Committee on Hawaiian Affairs. Chairman Ed Case (D- district 23: Manoa) scheduled a hearing on the bill on Thursday, February 13, 1997. Chairman Case began the hearing by reading Article XII, Section 7 of Hawai'i's Constitution, HRS 1-1, and excerpts from the *PASH* decision. Fifty-seven individuals submitted written testimony for the hearing: about one-third of the testimony favored the bill, while two-thirds opposed it. After receiving testimony, the House Committee on Hawaiian Affairs deferred action on the bill indefinitely, and Chairman Case encouraged those in opposition and in support of the bill to get together and work out a solution.

C. Other Attempts at Regulation

Despite the fact that SB 8 and HB 1920 did not become law through the 1997 legislative session, the backlash against *PASH* continues.²²⁰ After both bills were killed, various interests introduced two resolutions pertaining to the regulation of traditional and customary rights. House Concurrent Resolution 276 and House Resolution 197 ("HCR 276/HR 197") proposed that the Office of Planning of the Department of Business, Economic Development, and Tourism ("DBEDT") facilitate discussions with all interested parties and seek consensus on the appropriate regulation of traditional and customary rights under Article XII, Section 7. Representative Case wrote and introduced HCR 276/HR 197. After being offered, the Hawaiian Affairs Committee heard the resolution and passed it out on March 20, 1997. However, that Committee

natural state has been physically altered, through activities including farming . . . landscaping, grubbing, dredging, or grading." *Id.* Section 2, § 2, at 5. In addition to the significant reduction in areas available for use, HB 1920, § 10 allowed agencies to make more lands unavailable by issuing new development permits without considering the impact of its action on any Hawaiian traditions not yet "settled" by a circuit court. The bill's agency exemption thus *enabled* the extinguishment of customary uses, seriously contradicting the letter and spirit of Article XII, Section 7 as interpreted by this state's highest court.

²²⁰ The backlash against *PASH* is also taking place outside the legislative arena. For example, the Hawai'i County Planning Commission added several new requirements to the process of requesting contested case hearings. Telephone Interview with Susan Gagorik, Planner for the Hawai'i County Planning Comm. (Apr. 23, 1997). Effective February 17, 1997, individuals interested in a contested case hearing must complete a form (and have it notarized), pay a \$100 filing fee, and submit the request seven days before any public hearing on the issue. *See id.* In order to establish standing, the individual must either: 1) have a position distinct from the public at large; 2) be a government agency; 3) have a property interest in or legally reside on the property in question; 4) establish actual or threatened injury from the proposed action; or 5) claim a native Hawaiian gathering right. *See id.* The new requirements are unusual and may decrease efficiency of contested cases as people are forced to request hearings without the informational benefit of a public hearing. Telephone Interview with David Henkin, Attorney, Earthjustice Legal Defense Fund (Apr. 23, 1997).

amended the bill, by including the Department of Land and Natural Resources to assist DBEDT, and by proposing that monthly progress reports be issued to individuals interested in the discussions. The House Committees on Judiciary and Finance also approved the resolution without amendment and it was later adopted by the full House. The resolution finally crossed over to the Senate, but neither Senator Iwase or Solomon scheduled the resolution for a hearing.²²¹

On March 14, 1997 Senate Ways and Means Co-Chairs Carol Fukunaga (D-district 12: Tantalus) and Lehua Fernandez-Salling (D- district 7: Lihu'e, Hanapepe, Waimea, Ni'ihau) introduced Senate Concurrent Resolution 230, with identical text to Senate Resolution 114. Resolution 230 sought to fund a study of traditional and customary rights, which would be directed by the William S. Richardson School of Law at the University of Hawai'i at Manoa, in consultation with the community-at-large. The resolution requested the inclusion of 'Ilio'ulaokalani and student groups representing Native Hawaiian and other local interests. After being introduced, the Speaker referred the resolution to the Senate Committee on Water, Land, and Hawaiian Affairs. Co-Chairs Randy Iwase and Malama Solomon did not schedule the resolution for a hearing, and it died in committee.

Although Article XII, Section 7 allows for some regulation of traditional and customary use rights, the debate over the necessity and compatibility of such regulation with local interests, culture, and law continues.²²² In light of the unsettled nature of this issue, an analysis of SB 8 and HB 1920 provides insight on what elements of regulation, if any, are acceptable and workable.

V. ANALYZING SB 8 AND HB 1920

Although SB 8 and HB 1920 used different methods to regulate Native Hawaiian rights, these bills embodied many of the same concepts and utilized

²²¹ The DBEDT took action on HR 197 by appointing fifteen individuals representing Native Hawaiian, environmental, development, title, and State and County interests to a *PASH* study group (current members include: Nathan Aipa, Denise Antolini, Paul Brewbaker, Dan Davidson, David Forman, Virginia Goldstein, Walter Heen, Victoria Holt-Takamine, Davianna McGregor, Frances Mossman, David Pietsch, Hannah Springer, William Tam, Dean Uchida, and Bill Yuen). Telephone interview with Denise Antolini, *PASH* Study Group Member (Sep. 14, 1997). This assembly began meeting on July 25, 1997 and is hoping to: 1) determine if traditional and customary rights are a "problem" and if so, the scope of the problem, and 2) devise a range of dispute resolution models effective in addressing the issue. *See id.* The group began presenting its findings to various communities around the islands beginning in October, 1997. *See id.* The group also submitted findings to the state legislature twenty days before the start of the 1998 session. *See id.*

²²² The State's power to regulate the exercise of traditional and customary rights is limited. *See infra* note 260 and accompanying text.

similar definitions and conditions. The following section analyzes the bills' restriction to Native Hawaiians, restriction to *ahupua'a* tenants, definition of development, and method of proving customary usage before comparing the administrative and judicial adjudication of claims. SB 8 and HB 1920 will be simultaneously examined to determine whether they are: 1) constitutional; 2) in compliance with HRS 1-1 and 7-1; and 3) socially and culturally appropriate.

The three criteria selected for analysis enable a thorough investigation of the bills by considering the effects and implications of federal laws as well as principles unique to Hawai'i. These criteria also factor in the practical effects of current regulatory efforts. Beyond the legal issues, this analysis examines SB 8 and HB 1920 to determine if they are workable, affordable, and appropriate.

A. Restriction to Native Hawaiians

Senate Bill 8 and HB 1920 limited the "legal" exercise of traditional and customary practices to ethnic Hawaiians.²²³ Because Article XII, Section 7 of Hawai'i's Constitution protects the rights of "descendants of Native Hawai-

²²³ The restriction to Native Hawaiians predicated SB 8 and HB 1920 on a racial or ethnic distinction subjecting the bills to Equal Protection challenges under the State and Federal Constitutions. The United States Supreme Court ruled that any explicitly race-based state action is subject to strict judicial scrutiny. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). In *Adarand Constructors, Inc. v. Peña*, the Court went further in holding that "all racial classifications, imposed by whatever federal, state, or local government actor, must be analyzed by a reviewing court under strict scrutiny." 515 U.S. 200 (1995). The State of Hawai'i would thus have to prove that the bills are "narrowly tailored measures" necessary to achieve a "compelling governmental interest." *Id.*

The State may assert that because Native American groups have a distinct political status, state, or federal governments need only provide a rational as opposed to compelling governmental objective for utilizing a Native American classification. See *Morton v. Mancari*, 417 U.S. 535 (1974)(ruling that reasonable and rationally designed actions targeting a political class are not invidious racial discrimination). Moreover the State may argue that because the Hawai'i Supreme Court recognized that Native Hawaiians have a unique political status, use of this classification is exempt from strict judicial scrutiny. See *Ahuna v. Department of Hawaiian Home Lands*, 64 Haw. 327, 640 P.2d 1161 (1982)(analogizing Native Hawaiian status to that of other Native Americans). Despite this rationale, the State must also consider the fact that the Federal District Court in Hawai'i limited the use of Native Hawaiians' political status to efforts of the federal government or state actions under federal law. See *Nali'ielua v. State of Hawai'i*, 795 F. Supp. 1009, 1013 n.4 (D. Haw. 1990)(ruling that legislation granting preference to Native Hawaiians does not constitute invidious racial discrimination), *aff'd*, 940 F.2d 1535 (9th Cir. 1991)(Mem.). But see Stewart Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 Yale L.J. 537 (1996)(arguing that the trust relationship between American Indians and the US government does not apply to Native Hawaiians).

ians[.]”²²⁴ this restriction comported with the language of the state constitution. The legislative history of the Amendment and passages in *PASH*, however, contemplate the extension of traditional and customary rights to non-Hawaiians.²²⁵

Although the text and judicial interpretations of Article XII, Section 7 provide Native Hawaiians with an independent legal basis for traditional and customary rights, the legislative history also expressed the notion that non-Hawaiians may exercise certain customs and uses.²²⁶ While discussing which rights vested in ethnic Hawaiians as opposed to non-Hawaiians, Frenchie De Soto, Chair of the Constitutional Convention’s Committee on Hawaiian Affairs, noted that “any right enjoyed by a Native Hawaiian is also truly enjoyed by those who are non-Hawaiian. If you are fortunate enough to marry a Hawaiian, certainly you may follow her right down to the beach.”²²⁷ Although Article XII, Section 7 of the Constitution provides special protection for traditional and customary uses exercised by ethnic Hawaiians, it does not foreclose non-Hawaiians from exercising protected uses.²²⁸ Senate Bill 8 and HB 1920’s reservation of customary rights for Native Hawaiians therefore incorporated the narrowest possible view of Article XII, Section 7 and opened themselves to constitutional challenge.²²⁹

Furthermore, neither HRS 1-1 or 7-1 specify that only Native Hawaiians are eligible to claim traditional and customary rights under either statute.²³⁰ For

²²⁴ See *Ahuna*, 64 Haw. at 327, 640 P.2d at 1161.

²²⁵ See *Hearings on S. 8, Relating to Land Use*, 19th Leg., 1st Reg. Sess. 3 (1997)(testimony of David Lane Henkin, Attorney, Earthjustice Legal Defense Fund)[hereinafter *SB 8 Hearing*]. Henkin explained that “*PASH/Pilago* left the door open to the assertion of traditional and customary rights by ‘descendants of citizens of the Kingdom of Hawai’i who *did not* inhabit the Hawaiian islands prior to 1778 or by other non-Hawaiians.” *Id.* (emphasis in original). Professor Williamson B.C. Chang confirmed this position noting, “The Hawai’i Supreme Court has not confined the benefits of native Hawaiian rights to native Hawaiians as a race or ethnic group.” See *SB 8 Hearing, supra* at 1 (testimony of Williamson B.C. Chang, Professor of Native Hawaiian Rights, Univ. of Haw. at Manoa, William S. Richardson Sch. of Law).

²²⁶ See COMM. OF THE WHOLE DEBATES, reprinted in 2 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAI’I OF 1978 at 436 (1980).

²²⁷ *Id.* In light of the Hawai’i Supreme Court’s clarification of Article XII, Section 7 in *PASH*, the class of non-Hawaiian individuals enabled to practice traditional and customary rights is arguably broader than those persons married to Native Hawaiians. See *infra* notes 233-34 and accompanying text.

²²⁸ See *supra* note 225 and accompanying text.

²²⁹ Exactly which individuals are eligible to exercise traditional and customary rights is unclear. Although the class of possible practioners is arguably larger than individuals married to Native Hawaiians, that class is not without limitation. Some Native Hawaiian scholars and practioners advocated limiting the class to individuals with a minimal level of training and expertise. See *infra* note 253 (statement by Davianna McGregor).

²³⁰ See Chang, *supra* note 225, at 1. Professor Chang characterized SB 8’s limitation to Native Hawaiians as “a fundamental misreading of the State Supreme Court’s interpretation of

example, HRS 1-1 protects *customs* established by Hawaiian usage. Arguably, persons of various ethnic or racial backgrounds could exercise uses protected by that statute, if the custom was established in practice by November 25, 1892.²³¹

In 1892, citizens of numerous ethnic and national extractions inhabited the Hawaiian Kingdom. Regardless of their descent, subjects of the Hawaiian Kingdom may therefore have practiced, if not established, usage now considered traditional and customary.²³² In *PASH*, the court declined to limit the exercise of customary rights to Native Hawaiians and refused to decide whether descendants of citizens of the Kingdom of Hawai'i who were not of Native Hawaiian extraction could assert rights under HRS 1-1.²³³ The court also "expressly reserved comment" on whether Article XII, Section 7 protected the rights of non-Hawaiian members of an *'ohana*.²³⁴ Senate Bill 8 and HB 1920 therefore created a limitation that the State of Hawai'i's highest court, charged with interpreting the constitution, repeatedly declined to impose.²³⁵

The practical effects of limiting traditional and customary uses to Native Hawaiians would have severely limited the cultural practices of many island residents.²³⁶ Mixed-race families could no longer legally engage in whole-group outings, as both bills precluded non-Hawaiian members from participat-

section 1-1 and section 7-1. The Hawai'i Supreme Court has never reserved particular rights only to native Hawaiians." *Id.*

²³¹ The Hawai'i Supreme Court ruled that a use must be established in practice by November 25, 1892, to be considered traditional and customary. *See State of Hawai'i v. Zimring*, 58 Haw. 106, 116, 566 P.2d 725, 732 n.11 (1977) (citations omitted). *See supra* Part I.D for additional explanation.

²³² For example, on Moloka'i, the hunting of deer introduced during the 1850's is considered traditional and customary by many Native Hawaiians, although it was not practiced in Hawai'i prior to the arrival of Captain Cook in 1778. Telephone Interview with Davianna Pomaika'i McGregor, Associate Professor in Ethnic Studies, Univ. of Haw. at Manoa (Dec. 18, 1997). Second, although feral pigs existed in Hawai'i in pre-contact times, it is questionable whether they were "hunted" in the method commonly practiced today. *Id.*

²³³ *See Public Access Shoreline Hawai'i v. Hawai'i County Planning Comm.*, 79 Hawai'i 425, 449, 903 P.2d 1246, 1270 n.41 (1995).

²³⁴ *See id.*

²³⁵ *See Henkin, supra* note 225, at 3. Citing *PASH*, Henkin noted "to be consistent with the traditional practice of *hanai* and the Aloha Spirit, practitioners who are associated with native Hawaiians by marriage, adoption or other close relationship should enjoy the same protection as those who can trace their genealogies back to 1778." *Id.*

²³⁶ Telephone Interview with Davianna Pomaika'i McGregor, Associate Professor in Ethnic Studies, Univ. of Haw. at Manoa (Apr. 24, 1997). Professor McGregor explained that in many rural communities (*i.e.*, Hana, Maui; Puna, Hawai'i; Moloka'i; Windward O'ahu), "most people are touched by traditional and customary practices in one way or another, even though they don't participate directly." *Id.* Additionally, on neighbor islands, most people (including non-Hawaiians) continue these practices. *See id.*

ing. In addition, local residents who enjoy traditional pastimes like fishing or *lei* making would not have their practices protected as a matter of right.²³⁷ Finally, non-Hawaiians trained in Hawaiian customs, such as the *hula*, could not lawfully gather the items necessary for their continued practice.²³⁸

Supporters of the bills argued that clear guidelines were necessary for regulation.²³⁹ Their argument seems to suggest that lawmakers need to determine who is entitled to continue customary practices in order to avoid conflict and confrontation between landowners and practitioners.²⁴⁰ Proponents of the bills may claim that a restriction to ethnic Hawaiians is appropriate because these traditions are rooted in Hawaiian culture. Yet, this line of reasoning fails to consider other methods of preventing the ingenuine exercise of custom, like managing the *use* as opposed to the *user*.

B. Restriction to *Ahupua'a* Tenants

Senate Bill 8 and HB 1920 also limited the exercise of traditional and customary uses to *ahupua'a* tenants.²⁴¹ Although this reservation is arguably

²³⁷ See *Hearing on HB 1920, Relating to Land Use*, 19th Leg., 1st Reg. Sess. 1 (Haw. 1997) (testimony of Victoria Holt Takamine, *Kumu Hula*, Pua Ali'i Ilima) (noting that some non-Hawaiian practitioners must be allowed to practice as a matter of right or "some of our most valuable retainers and practitioners of Hawaiian culture, along with the knowledge they acquired, would be lost to us") [hereinafter Holt-Takamine, *HB 1920 Testimony*].

²³⁸ See *SB 8 Hearing*, *supra* note 225, at 1 (testimony of Victoria Holt Takamine, *Kumu Hula*, Pua Ali'i Ilima) [hereinafter Holt-Takamine, *SB 8 Testimony*]. Holt-Takamine explained that due to increasing development "many of the areas that provided the materials for native Hawaiian cultural practices are now either eliminated or inaccessible," and practitioners are forced to seek out new gathering places. See *id.* These practitioners would be unable to trace continued use to 1892 and thus ineligible to petition for and register their uses. Holt-Takamine further related the negative impacts SB 8 would have on her *hula halau*, especially non-Hawaiian *hula* students. See *id.*

²³⁹ See *HB 1920 Hearing*, *supra* note 237, at 2 (testimony of David T. Pietsch, Executive Vice President, Title Guaranty of Hawai'i) (noting that clear guidelines and a definition of rights are necessary to alleviate uncertainty).

²⁴⁰ See *id.* Pietsch expressed an interest in working to establish guidelines for "a defined and efficient system in order to determine and resolve any differences as to the existence, nature and location of such Native Rights Additionally, the failure to clarify the rights and responsibilities of the native Hawaiians and the land owners will lead to conflict and confrontation between them[.]" *Id.*

²⁴¹ Although both bills limited the exercise of traditional and customary practices to *ahupua'a* tenants, HB 1920 used the term "lawful occupants" of an *ahupua'a*. See H.R. 1920 Section 2, § 2, at 4. The *Kalipi* decision utilized this phrase in reference to permanent (as opposed to temporary) residents of an *ahupua'a*. This specific term is notable because visitors as well as renters—as opposed to landowners—are arguably ineligible to continue traditional uses if considered temporary residents. See *Kalipi v. Hawaiian Trust Co.*, 66 Haw. 1, 8, 656 P.2d 745, 749-50 (1982).

consistent with Article XII, Section 7's phrasing, "tenants of an *ahupua'a*," any complete examination of the limitation must consider the legislative history of the Amendment. The drafters of Article XII, Section 7 sought to "preserve the small remaining vestiges of a quickly disappearing culture"²⁴² and "did not intend to have the section narrowly construed or ignored by the courts."²⁴³

The Hawai'i Supreme Court is responsible for interpreting the state constitution.²⁴⁴ In *Pele*, the court held that "rights protected by Article XII, Section 7 may extend beyond the *ahupua'a* in which a Native Hawaiian resides where such rights have been customarily and traditionally exercised in this manner."²⁴⁵ Senate Bill 8 and HB 1920, therefore, contradict both the legislative history and the court's interpretation of Article XII, Section 7, which expanded traditional rights to non-resident tenants of an *ahupua'a*.²⁴⁶

Additionally, neither HRS 1-1 or 7-1 contain any limitation to *ahupua'a* tenants.²⁴⁷ As discussed above, HRS 1-1 protects established *uses* independent of residency. Any confusion over this issue was clarified in *Pele*, and later affirmed in *PASH*, when the Hawai'i Supreme Court sanctioned the exercise of traditional and customary rights by non-tenant occupants of an *ahupua'a*.²⁴⁸ Likewise, HRS 7-1 protects rights of access, gathering, and water, without a residency requirement.²⁴⁹ House Bill 1920 and SB 8's limitation of traditional and customary rights to *ahupua'a* tenants therefore imposed conditions

²⁴² STAND. COMM. REPORT, reprinted in 2 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978 at 640 (1980).

²⁴³ *Id.* Article XII, Section 7's legislative history clearly exhibits the drafter's intent to recognize and protect traditional and customary uses. In light of this background, the State's ability to use its regulatory authority to unilaterally restrict the exercise of these rights is questionable.

²⁴⁴ Interview with Jon Van Dyke, Professor of Constitutional Law, Univ. of Haw. at Manoa, William S. Richardson Sch. of Law, in Honolulu, Haw. (Sept. 17, 1997)(explaining that state supreme courts have primary responsibility for interpreting state constitutions). See generally JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW § 1.6C (4th ed. 1991)(notes on review of state laws).

²⁴⁵ *Pele Defense Fund v. Paty*, 73 Haw. 578, 620, 837 P.2d 1247, 1272 (1992).

²⁴⁶ See *SB 8 Hearing*, *supra* note 225, at 3 (testimony of Malia Akutagawa, Native practitioner and lawyer specializing in Native Hawaiian rights). Akutagawa traced the expansion of Native Hawaiian rights from *Kalipi* and *Pele* to *PASH*. See also Part II.B *infra*, highlighting the fact that in *PASH* the Court "stated that any Hawaiian shall have a right to exercise traditional and customary practices on lands that are 'less than fully developed' regardless of *ahupua'a* tenancy." *Id.*

²⁴⁷ See *supra* Part I.C for full text of HRS section 1-1 and section 7-1.

²⁴⁸ See *Pele*, 73 Haw. at 620, 837 P.2d at 1272.

²⁴⁹ See *supra* Part I.C for full text of HRS section 7-1.

inconsistent with the text and judicial interpretations of both statutory provisions.²⁵⁰

Bill supporters again responded that guidelines were necessary to resolve disagreements over legitimate exercises of customary rights.²⁵¹ Furthermore, those supporters heavily relied on the fact that *Kalipi* utilized a residency requirement to prevent abuse of such rights. Specifically, the *Kalipi* decision noted that the "extension of these rights to absentee landlords would be contrary to the intention of the framers in that the right would thereby be spread to those whose only association with the *ahupua'a* may be by virtue of an economic investment."²⁵² Despite this reasoning, *Pele* clarified *Kalipi* to accommodate the established practices of community access or gathering beyond the boundaries of the *ahupua'a* on the basis of HRS 1-1.²⁵³

Finally, the social and cultural impacts of a restriction to *ahupua'a* tenants are enormous.²⁵⁴ The rapid rate of development combined with the tendency to focus urban growth in certain sections of an island resulted in the complete development of some *ahupua'a*, while others remain relatively untouched. Under SB 8 and HB 1920, Native Hawaiians living in fully developed areas like Honolulu were unable to legally exercise *any* traditional and customary rights. Because contemporary *ahupua'a* do not provide all of the products necessary to further subsistence, religious, and cultural practices, many practitioners go outside of their communities to gather necessary products.²⁵⁵

²⁵⁰ This Comment does not suggest that traditional and customary rights may be exercised in an unlimited fashion. Although the specifics of this issue may not be narrowly construed by the courts, communities may and do impose their own forms of regulation. See *supra* note 229.

²⁵¹ See *supra* notes 239-40.

²⁵² *Kalipi v. Hawaiian Trust Co.*, 66 Haw. 1, 8, 656 P.2d 745, 750 (1982).

²⁵³ See *SB 8 Hearing*, *supra* note 225 (testimony of Davianna Pomaika'i McGregor, Associate Professor in Ethnic Studies, Univ. of Haw. at Manoa, expert witness in *Pele*). Professor McGregor stated that gathering and access rights must be examined in the context of the traditions and customs perpetuated in specific communities. She further explained that in some rural communities, gathering practices span several *ahupua'a* within a *moku*. Professor McGregor finally noted that the scope of gathering rights was expanded in *Pele* because that was the practice in Puna (the district where the case took place). See *id.*

²⁵⁴ See *HB 1920 Hearing*, *supra* note 237 (testimony of Davianna Pomaika'i McGregor, Associate Professor in Ethnic Studies, Univ. of Haw. at Manoa, Expert witness in *Pele*)[hereinafter McGregor, *HB 1920 testimony*]. Professor McGregor gave extensive oral testimony on the negative impacts of this regulation on native practitioners, noting in her written testimony that "subsistence is a very important sector of Hawai'i's economy. . . . The Moloka'i Subsistence Study found that on Moloka'i, 28% of the diet of all the families comes from subsistence activities, and for Hawaiian families, 38% of their diet comes from subsistence." *Id.* at 3. The impact of not being able to legally continue those practices would be significant both on Moloka'i, and elsewhere in the islands.

²⁵⁵ See Holt-Takamine, *HB 1920 Testimony*, *supra* note 237, at 1 (Holt-Takamine explaining that some resources are only available in certain *ahupua'a*, and that the bills' restriction to *ahupua'a* tenants were both "ridiculous" and contrary to historical practice).

In addition, some communities, as the Hawai'i Supreme Court recognized in *Pele*, traditionally exercised customary rights beyond the boundaries of the *ahupua'a* where they reside.²⁵⁶ To now utilize the concept of *ahupua'a* to limit the exercise of traditional and customary uses is a legal fiction that misconstrues pre-contact understandings and ways of living.

In addition, many Native Hawaiians moved to urban areas seeking employment or housing.²⁵⁷ In the event that those individuals go back to the areas they grew up in, or visit family on other islands, they would not be eligible to join family members in customary practices.²⁵⁸ Senate Bill 8 and HB 1920 did not address or account for these problems.

C. The Definition of "Development"

Senate Bill 8 and HB 1920 restricted the exercise of traditional and customary uses to undeveloped land. Both bills utilized similar definitions, allowing the continuity of custom only on parcels where 1) no structures exist, 2) no improvements were made, and 3) no grading or grubbing occurred.

First, although Article XII, Section 7 authorizes the State to "regulate" traditional and customary uses, the legislative history explains the reasons for and extent of the State's authority. Contrary to the idea that the State may callously regulate any exercise of customary rights, the Amendment was actually added in response to actions by "private landowners, large corporations, ranches, large estates, hotels and government entities,"²⁵⁹ which interfered with the exercise of traditional and customary rights. In light of those constraints, "reasonable regulation [wa]s necessary to prevent possible abuse as well as interference with these rights."²⁶⁰

²⁵⁶ Telephone Interview with Davianna Pomaika'i McGregor, Associate Professor in Ethnic Studies, Univ. of Haw. at Manoa, expert witness in *Pele* (Dec. 18, 1997). For example in Pelekunu and Wailau on the island of Moloka'i, members of the community went beyond the *ahupua'a* to Kaluako'i in order to catch and prepare fish for the winter months. See *id.*

²⁵⁷ See *HB 1920 Hearing*, *supra* note 237 (testimony of Kawika Liu, Attorney, Winer and Meheula). Liu highlighted the fact that many Native Hawaiians are exercising traditional and customary practices in "new areas." "[T]he disease and alienation imposed by foreigners has forced the majority of *Kanaka Maoli* to move away from their ancestral lands, and to practice their customs where they find themselves living." *Id.* at 3.

²⁵⁸ See *SB 8 Hearing*, *supra* note 225, at 1 (testimony of Ilima Morrison, Univ. of Haw. Law Student Class of 1998)(opposing SB 8 in part because "Hawaiians who exercise the right to live in a new *ahupua'a* must give up their full range of rights under State law").

²⁵⁹ STAND. COMM. REPORT, *reprinted in* 2 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978 at 639 (1980).

²⁶⁰ *Id.* (emphasis added). In light of the legislative history to the amendment, the State's power to regulate traditional and customary uses is arguably limited to (1) protecting landowners against the abuse of rights, and (2) preventing landowners from interfering with the exercise of rights. See *supra* Part III.A.

Opponents of the bills may respond that although the State is empowered to regulate the exercise of Native Hawaiian rights it may do so only to address potential or actual abuse.²⁶¹ Because proponents of the bill never conclusively established any such abuse, HB 1920 and SB 8 exceeded the State's regulatory authority.²⁶² Proponents of the bills might reply that individual entitlements to exercise traditional and customary rights need to be explored because difficulty in securing title insurance and other complications in selling their property amount to abuse.²⁶³

Second, neither HRS 1-1 or 7-1 restrict the exercise of traditional and customary practices to undeveloped land.²⁶⁴ The Hawai'i Supreme Court in *Kalipi* expressly acknowledged that the undeveloped land limitation "is not, of course, found within the statute [HRS 7-1]."²⁶⁵ Yet the court created that

²⁶¹ See *SB 8 Hearing*, *supra* note 225 (testimony of Isaac Moriwake, Univ. of Haw. Law Student Class of 1998)(highlighting the fact that the State power to regulate traditional and customary uses under Article XII, Section 7, should be exercised in a manner consistent with its legislative history).

²⁶² Several interest groups presenting testimony in opposition to the bills questioned the need for regulation. In their testimony opposing HB 1920, Hawai'i's Thousand Friends questioned the need for regulatory efforts, and instead suggested that title insurance companies take action to mitigate their concerns. "We do not see how these problems get laid at the doorstep of the PASH decision. How many 'instances' have occurred and how was it determined that the PASH decision is responsible?" See *HB 1920 Hearing*, *supra* note 237, at 1 (testimony of Hawai'i's Thousand Friends, community action group). David Frankel of the Sierra Club likewise questioned the need for regulation in absence of proof of the negative impacts of traditional and customary uses, stating "[s]upporters cannot point to a single case where the PASH/Kohanaiki case has prevented a bank from making a loan." See *HB 1920 Hearing*, *supra* note 237, at 1 (testimony of David Kimo Frankel, Sierra Club - Hawai'i Chapter).

²⁶³ Almost all testimony presented in support of the bills mentioned that the "uncertainty" of the PASH decision constrained their ability to either develop, sell, obtain title insurance, or secure loan guarantees for their property, and urged regulation of some kind. See *SB 8 Hearing*, *supra* note 225, at 1 (testimony of Kealakekua Dev. Corp., landowner/developer) ("As we have made a substantial long term investment in our land in Hawai'i, it is only fair that private property rights as well as our project plans are protected from the recent PASH decision. We are extremely concerned that our investment, future project plans and the ability to get financing are in great jeopardy."); *HB 1920 Hearing*, *supra* note 237, at 1 (testimony of Waikoloa Land Co., developer) ("The recent PASH decision has created uncertainty on the part of title companies and lenders and is having a chilling effect on capital investment in real estate in Hawai'i."); *HB 1920 Hearing*, *supra* note 237, at 1 (testimony of Dan Davidson, Executive Director, Land Use Research Foundation) ("There is serious concern among landowners and developers as to their ability to plan, finance, and seek approvals for their projects without such a mechanism."). See also *infra* notes 270-71 and accompanying text.

²⁶⁴ See *HB 1920 Hearing*, *supra* note 237, at 3 (testimony of Moses Haia, Attorney, Native Hawaiian Advisory Council)(opposing HB 1920, in part, because the extinguishment of rights on "fully developed" land "flies in the face" of Article XII, Section 7 and HRS sections 1-1, 7-1).

²⁶⁵ *Kalipi v. Hawaiian Trust Co.*, 66 Haw. 1, 8, 656 P.2d 745, 750 (1982).

limitation to avoid conflict between practitioners and landowners.²⁶⁶ More recently, the court in *PASH* declined the "temptation to place undue emphasis on non-Hawaiian principles of land ownership[,]""²⁶⁷ electing "not to scrutinize the various gradations in property use that fall between the terms 'undeveloped' and 'fully developed.'""²⁶⁸ Instead, the court emphasized the need to make determinations on a case-by-case basis.²⁶⁹

Opponents of the bills therefore argued that the standardized definitions for "fully developed" and "undeveloped" failed to reflect the court's ruling that those decisions must be made on a case-by-case basis. Bill supporters responded that the absence of a clear definition of "fully developed" clouds title ownership to land.²⁷⁰ They warned that if landowners are uncertain about whether their parcels are subject to traditional and customary uses this "uncertainty" could discourage investment by parties unfamiliar with the exercise of such uses in Hawai'i.²⁷¹

²⁶⁶ See *id.*

²⁶⁷ *Public Access Shoreline Hawai'i v. Hawai'i County Planning Comm'n*, 79 Hawai'i 425, 450, 903 P.2d 1246, 1271 (1995).

²⁶⁸ *Id.*

²⁶⁹ See *id.* at 451, 903 P.2d at 1272.

²⁷⁰ Much of the testimony in opposition to the bills mentioned that the unresolved nature of traditional and customary rights following *PASH* clouds land title. See, e.g., *HB 1920 Hearing*, *supra* note 237 (testimony of Gary Oliva, Senior Legal Counsel, Estate of James Campbell). "The *PASH* decision raises issues for all owners of property in Hawai'i These uncertainties have created title difficulties which will seriously limit efforts to use land for agriculture, development or any significant economic use. It will make it difficult if not impossible in many cases, to insure titles, and to finance or obtain mortgages." *Id.* at 1.

²⁷¹ When the Hawai'i Supreme Court issued the *PASH* decision, land title and development interests in the islands voiced sharp criticism. These groups disapproved of the potential "uncertainty" the decision might impose on the land use approval process. Dan Davidson, *The PASH Decision: it's Potential Impact Upon Hawai'i's Land Use Approvals Process* 61 (Dec. 8, 1995)(unpublished manuscript prepared for a Hawai'i Institute for Continuing Legal Education Seminar, on file with author) [hereinafter *Potential Impact*]. Title insurance companies and lenders expressed apprehension that individuals would "use" the rights articulated in *PASH* to impede development, thereby chilling investment in Hawai'i. Telephone interview with John Jubinsky, Title Guaranty of Hawai'i (Aug. 12, 1997); Telephone interview with Ron Schmid, Exec. Vice Pres., Bank of Hawai'i (Aug. 13, 1997). Development interest groups also raised concerns about the decision's impact on tourism, added difficulty in securing title insurance and financing, and negative impacts on investment capital. See Davidson, *Potential Impact*, *supra* at 61.

In the two years since the court issued the decision, these fears failed to manifest on the grandiose scale predicted. Lenders and title insurance companies explain that Hawai'i's current "economic doldrums" created a period of low development. See Jubinsky, *supra* this note. See also Schmid, *supra* this note. Therefore, they claim the true effect of the decision has not yet been realized. See *id.*

For the most part, title insurance companies deal with the application of the *PASH* decision on a case-by-case basis, except with regard to residential or developed land, which are not

Finally, the social and cultural impacts of using the proposed definition of development are extensive.²⁷² If land is considered “developed” when grading, grubbing, or building permits are issued or walkways exist, many areas where traditional and customary uses are now exercised, without harm, will become legally unavailable. Instead of targeting problematic uses, SB 8 and HB 1920 summarily eliminate all uses in a given area, regardless of effect. As explained in the section above, this limitation also disproportionately impacted practitioners living in urban areas.

D. Proving Traditional and Customary Usage

The methods SB 8 and HB 1920 employed to establish a traditional and

clearly subject to traditional and customary rights. *See* Jubinsky, *supra* this note. Although *PASH* rights are viewed as a potential cloud on title, individuals continue to request insurance in spite of the possibility of future traditional and customary claims. *See id.* Title insurance companies must therefore examine each application for potential claims and weigh the likelihood that they will be exercised.

In addition, title insurance companies generally deal with traditional and customary rights as an exception to title. *See id.* Thus, insurance is provided, but any claims arising under traditional and customary rights are excluded from coverage. *See id.* Although insurance is available, the possibility of future customary claims is a disincentive to many buyers and lenders. *See id.* As one title insurance executive remarked, the *PASH* decision does not affect the ability to insure, “the question is will lenders lend and will buyers buy?” David Pietsch, Executive Vice President, Title Guaranty of Hawai‘i, Address at Hawai‘i Developers Council forum on Perfect Title (Jul. 24, 1997).

In roughly twenty-five or thirty insurance applications reviewed by Title Guaranty with respect to the *PASH* decision at the time of this interview, only four or five were rejected, about ten or twelve were endorsed, and the remainder have not been concluded. *See* Jubinsky, *supra* this note. While state-wide statistics are not available, Title Guaranty’s experience represents the general condition of the title industry.

Ron Schmid, Executive Vice President of Bank of Hawai‘i, explained that his company has not denied any loans for residential properties due to *PASH*. *See* Ron Schmid, Executive Vice President, Bank of Hawai‘i, Address at Hawai‘i Developers Council forum on Perfect Title (Jul. 24, 1997). After stating that “*PASH* has not had a dramatic effect,” he noted that with regard to commercial property, Bank of Hawai‘i has not had many opportunities to review the issue due to a declining interest in development. *See id.*

Why potential investors have refused to invest in Hawai‘i is yet unestablished and could be associated with any number of variables. The absence of a comprehensive study on this issue fails to support or deny the speculation that the *PASH* decision is responsible for Hawai‘i’s decline in investment appeal. Until such documentation is available, development interests will continue to seek some method to resolve the “substantial uncertainty” about customary rights, while practitioners search out ways to continue their traditions.

²⁷² *See* Akutagawa, *supra* note 246, at 4 (opposing the definition because it “serves to hinder Hawaiian custom to the point of extinguishing it”).

customary use are difficult to reconcile with Article XII, Section 7.²⁷³ The requirement of identifying rights with respect to a specific parcel of land conflicts with the legislative history of the constitutional provision classifying traditional and customary uses as "personal" rights.²⁷⁴ Like the freedom of speech and other fundamental rights, "[r]ather than being attached to the land, these rights are inherently held by Hawaiians and do not come with the land."²⁷⁵ Because the legislature did not require all residents to register their inherent rights, SB 8 and HB 1920 singled out Native Hawaiians and imposed special hardships on them as a class.²⁷⁶

The requirement of tracing actual use to 1892 is also a questionable interpretation of HRS 1-1.²⁷⁷ Although the Hawai'i Supreme Court determined that a custom must be established by 1892 in order to ensure protection, it did not contemplate or require documentation of the use in question to that date.²⁷⁸ It is therefore legally consistent with HRS 1-1 to prove that a custom was generally established in practice prior to 1892 without being site-specific.

Due in part to the way Hawaiian society incorporated Western concepts of private property, the Hawai'i Supreme Court recognized that the right "to exercise traditional and customary practices remains intact notwithstanding arguable abandonment of a particular site."²⁷⁹ In addition, the court established a three-point test for the doctrine of custom in Hawai'i requiring that: 1) a custom be *consistent* when measured against other Hawaiian customs; 2) a practice be *certain* in an objective sense; and that 3) a traditional use be exercised in a *reasonable* manner.²⁸⁰ Defining the reasonable use requirement, the court further explained that the balance leans in favor of establishing a use in the sense that "even if an acceptable rationale cannot be assigned, the custom is still recognized as long as there is no 'good legal reason' against it."²⁸¹ Senate Bill 8 and HB 1920's requirements for establishing a traditional

²⁷³ See Chang, *supra* note 225, at 1 (characterizing the registration and demonstration requirements as a "fundamental misunderstanding of native Hawaiian rights").

²⁷⁴ See STAND. COMM. REPORT, *reprinted in* 2 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978 at 639 (1980).

²⁷⁵ *Id.*

²⁷⁶ See Chang, *supra* note 225, at 1-2 (pointing out that "[l]egislation that is openly directed at burdening a specific race or ethnic group has always been the most invidious in American history," subjecting the legislation to equal protection challenges).

²⁷⁷ See Akutagawa, *supra* note 246, at 4 (opposing SB 8, in part because the definition of traditional and customary as pre-dating 1892 was "legally improper and inconsistent with judicial analysis").

²⁷⁸ See *State of Hawai'i v. Zimring*, 58 Haw. 106, 116, 566 P.2d 725, 732 n.11 (1977).

²⁷⁹ *Public Access Shoreline Hawai'i v. Hawai'i County Planning Comm'n*, 79 Hawai'i 425, 450, 903 P.2d 1246, 1271 (1995).

²⁸⁰ See *id.* at 447, 903 P.2d at 1268 n.39 (emphasis added).

²⁸¹ *Id.*

use, namely tracing site specific use to 1892, fail to comport with the three-point test and are therefore inconsistent with the current law.²⁸²

The social and cultural impacts of establishing that a use was traditional and customary only added to the difficulty of the proposed process. Native Hawaiian culture is based on oral traditions. Yet, use of the Hawaiian language was discouraged from the 1800's into the twentieth century, and many Hawaiians are now unable to speak their native tongue.²⁸³ Due in part to this loss of language, few Native Hawaiians can trace their genealogy to 1778.²⁸⁴ In addition, because the traditions were oral, few if any maintained the written documentation which the bills would have required. This lack of written documentation, when combined with the loss of language, creates a situation in which many Hawaiians cannot make use of the few written sources that remain available.

Due in large part to development, many families moved from their original *kuleana*, if they ever received one, and cannot establish use of a specific parcel to 1892. In pre-contact society, *maka'ainana* were "free to leave and take up residence in another *ahupua'a*, thereby transferring their vested rights, such as fishing, to a new area."²⁸⁵ The continuous use and residency requirements imposed by SB 8 and HB 1920 are thus inconsistent with both Hawaiian history and the legislative intent of Article XII, Section 7, which classifies customary rights as "personal." Native Hawaiian rights are firmly rooted in Hawai'i's culture and history.²⁸⁶ Legislators did not invent Article XII, Section 7 and HRS 1-1 and 7-1 on the eve of statehood or in the Constitutional Convention. These principles are the direct result of background principles of property law in these islands.²⁸⁷ Current interpretations

²⁸² See Akutagawa, *supra* note 246, at 2-3 (Akutagawa argued that SB 8 was "inconsistent with judicial precedents and statutory and constitutional guarantees," and asserted that it failed to comport with *Kalipi*, *Pele*, and *PASH*).

²⁸³ Missionaries heavily promoted the use of English: adopting it as the language of instruction, closing Hawaiian language schools, and eventually adopting English as the only official language in 1896. See HAUNANI-KAY TRASK, *FROM A NATIVE DAUGHTER: COLONIALISM AND SOVEREIGNTY IN HAWAII* 21, 81 (1993).

²⁸⁴ Many Native Hawaiians who testified in opposition to the bills explained that they would not be able to provide proof of their Hawaiian descent prior to 1778. See *SB 8 Hearing, supra* note 225 (testimony Victoria Holt-Takamine, *Kumu Hula*, Pua Ali'i Ilima noting that she, like many others, cannot trace her genealogy to 1778).

²⁸⁵ STAND. COMM. REPORT, *reprinted in* 2 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978 at 640 (1980).

²⁸⁶ See *HB 1920 Hearing, supra* note 237 (testimony of Hayden Aluli, Native Hawaiian rights attorney). Alului traced the evolution of Hawaiian rights from the institution of private property in Hawai'i—the Mahele of 1848—to the present day. See *id.* at 3-9.

²⁸⁷ See COMM. OF THE WHOLE DEBATES, *reprinted in* 2 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978 at 436 (1980) ("The rights we wish to protect are listed statutorily. These traditional and customary rights did not fall out of heaven into our

must respect and reflect that unique history.

Supporters of SB 8 and HB 1920 responded that the expeditious resolution of claims requires objective criteria.²⁸⁸ In light of the many unresolved issues in *PASH*, they argued for guidelines "which w[ould] permit those Native Hawaiians who rightfully possess these rights and all landowners to have a defined and efficient system in order to determine and resolve any differences as to the existence, nature and location of such Native Hawaiian Rights."²⁸⁹ Arguably, some criterion are necessary to determine whether a use is customary, such as establishing continued usage on a specific site. But, according to proponents, this process of determination assumed that traditional and customary rights would not be available in the same extent as pre-contact society.²⁹⁰ Those arguments are difficult to justify, however, in light of both legislative intent and judicial interpretation: the protection of traditional and customary rights is "necessary to insure the survival of those who in 1851, sought to live in accordance with the ancient ways. They thus remain, to the extent provided in the statute, available to those who wish to continue those ways."²⁹¹

E. Comparing Administrative and Judicial Adjudication of Claims

1. SB 8's administrative resolution of claims

While SB 8 and HB 1920 employed many of the same concepts, their methods of regulation differed. Senate Bill 8 proposed that the Land Use Commission resolve Native Hawaiian claims and issue certificates if it were to determine that an applicant established a traditional and customary use.²⁹² Meanwhile, individuals could not legally exercise customary practices without

laps while we were having committee deliberations."); *See HB 1920 Hearing, supra* note 237, at 2 (testimony of Alan Murakami, Attorney, Native Hawaiian Legal Corp., testifying that traditional and customary rights themselves "existed both before and after the creation of Hawai'i's system of private property in 1848").

²⁸⁸ *See also HB 1920 Hearing, supra* note 237, at 2, (testimony of Robin Sagadraca, President, Hawai'i Land Title Association, explaining that guidelines should be developed to aid in the determination of whether a use is protected).

²⁸⁹ Pietsch, *supra* note 239, at 2.

²⁹⁰ *See also HB 1920 Hearing, supra* note 237 at 1 (testimony of Thos Rohr, President, Hawai'i Resort Developers Conference, noting that it is necessary to include "specific exclusions for lands to which claims are not appropriate").

²⁹¹ *Public Access Shoreline Hawai'i v. Hawai'i County Planning Comm'n*, 79 Hawai'i 425, 439, 903 P.2d 1246, 1260 (1995)(quoting *Kalipi v. Hawaiian Trust Co.*, 66 Haw. 1, 8-9, 656 P.2d 745, 749-50 (1982)(citation omitted)).

²⁹² *See SB 8 § 205B(a)*, at 4.

such a certificate.²⁹³ The imposition of that condition would immediately alter the status and practice of traditional and customary rights, thus subjecting SB 8 to due process challenges.

Both the state and federal constitutions prohibit government bodies from denying citizens life, liberty, or property without due process of the law.²⁹⁴ These provisions provide substantive guarantees that individuals will not be deprived of an interest without the opportunity to present a defense.²⁹⁵ Procedural protections are also mandated to ensure that rights will not be unfairly divested.²⁹⁶ The inability to legally exercise traditional and customary uses until a hearing is held, and the extinguishment of rights if a practitioner did not respond to or complete the claims process, would thus violate due process.²⁹⁷

In addition, the procedure for determining and registering traditional and customary rights did not provide adequate assurances that those rights would not be unjustly extinguished. In *Mathews*, the United States Supreme Court articulated a three-part test to determine the constitutional sufficiency of a process.²⁹⁸ To satisfy this test, claimants must determine: 1) if private interests are at stake; 2) the risk of erroneous decisions compared with the probable value of additional safeguards; and 3) the scope of the government's interest.²⁹⁹ Because the traditional and customary rights of Native Hawaiians are targeted by SB 8, the first element of the test is satisfied. Moreover, the Land Commission does not have sufficient expertise to consider the intricate legal and social principles necessary to determine whether a use is protected, which creates a significant risk of erroneous decisions, and satisfies the second prong of the *Mathews* test.³⁰⁰ Although the government has an interest in protecting and regulating customary rights, the *possible* effect of recent court decisions did not create a government interest sufficient to justify the

²⁹³ See *id.*

²⁹⁴ See U.S. CONST. amend. V; HAW. CONST. art. I, § 5.

²⁹⁵ See *Goldberg v. Kelly*, 397 U.S. 254 (1970).

²⁹⁶ See *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

²⁹⁷ See *Goldberg*, 397 U.S. at 261 (privileges may be terminated only after a hearing on the merits of a claim). Several individuals presenting testimony in opposition to SB 8 cautioned the Committee about due process violations. See Henkin, *supra* note 225, at 1 (opposing SB 8 due in part to due process concerns).

²⁹⁸ See *Mathews*, 424 U.S. at 335.

²⁹⁹ See *id.*

³⁰⁰ See also *SB 8 Hearing*, *supra* note 225 (testimony of Esther Ueda, Chair, Hawai'i Land Use Comm.). Ueda presented oral testimony in opposition to SB 8 specifically stating that the Commission lacked both the resources and expertise to adjudicate contested case hearings on traditional and customary rights.

enormous fiscal and administrative burdens of the proposed process.³⁰¹ Since Native Hawaiians risk losing their traditional and customary rights permanently, a fair and expedited process is absolutely necessary.³⁰² Senate Bill 8's substantive and procedural inadequacies thus make it constitutionally unacceptable.³⁰³

In addition to due process, the Federal and State Constitutions also prohibit the taking of property without just compensation.³⁰⁴ Property is considered "taken" if it is permanently and physically occupied by the government or regulated to a point where the landowner is deprived of all economically beneficial use of that parcel.³⁰⁵ Landowners in Hawai'i may therefore argue that State protections for traditional and customary practices are equivalent to a regulatory taking.

In evaluating the takings argument, several factors must be considered. First, the right of practitioners to reasonably access and/or gather on a specific parcel of undeveloped land does not deprive an owner of "all economically beneficial use."³⁰⁶ The Hawai'i Supreme Court first stated in *Kalipi*, and again noted in *PASH*, that "Article XII, Section 7 does not require the preservation"³⁰⁷ of lands where traditional and customary practices occur. Since the protection of traditional and customary uses by the state constitution does not require that lands remain undeveloped, landowners cannot establish that Article XII, Section 7 deprives them of all beneficial use.³⁰⁸

Second, the United States Supreme Court recognized two situations that will never amount to a regulatory taking: 1) the regulation of nuisances; and 2) regulations that were "part of a state's background principles of real property."³⁰⁹ Traditional and customary uses are the genesis of Hawai'i's

³⁰¹ Despite the perceived impact of the *PASH* decision, testimony in opposition to SB 8 and HB 1920 failed to present statistics or studies conclusively establishing negative impacts resulting from the decision.

³⁰² See Henkin, *supra* note 225, at 1 (expressing concern that the procedure proposed to reconcile traditional and customary rights would result in depriving practitioners of their constitutional rights).

³⁰³ See *id.*

³⁰⁴ See U.S. CONST. amend. V; HAW. CONST. art. I, § 20.

³⁰⁵ See David L. Callies, *After Lucas and Dolan: An Introductory Essay in TAKINGS: LAND-DEVELOPMENT CONDITIONS AND REGULATORY TAKINGS AFTER DOLAN AND LUCAS* 3-25 (David Callies ed., 1996).

³⁰⁶ See generally *id.*

³⁰⁷ *Public Access Shoreline Hawai'i v. Hawai'i County Planning Comm'n*, 79 Hawai'i 425, 451, 903 P.2d 1246, 1272 (1995).

³⁰⁸ See Chang, *supra* note 225, at 2-3 (testifying that traditional and customary rights could not amount to a regulatory taking).

³⁰⁹ Callies, *supra* note 305, at 5.

background principles of real property.³¹⁰ Hawai'i Revised Statutes 1-1 and 7-1, and Article XII, Section 7 simply reflect concepts of pre-contact land tenure, codified by the Kingdom, Provisional Government, Territory, and now by the State of Hawai'i. Traditional and customary usage is not merely a background principle, it supersedes other Western principles of property in Hawai'i.³¹¹ In holding that the recognition of traditional and customary rights did not constitute a judicial taking, the court in *PASH* explained that a takings claim placed "undue reliance on western understanding of property law that are not universally applicable in Hawai'i."³¹² Finally, should the Land Use Commission modify or terminate traditional and customary practices, it would have to establish that such action was necessary to further a compelling state interest, or compensate practitioners for taking their traditional and customary rights.³¹³

Article XII, Section 7 requires the State to reaffirm and protect "all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes[.]"³¹⁴ While this provision allows limited regulation,³¹⁵ "the State does not have the unfettered discretion to regulate the rights of *ahupua'a* tenants out of existence."³¹⁶ Because SB 8's definition of undeveloped land extinguished a practitioner's ability to continue practices on certain types of property, it blatantly contradicted the court's mandate of protection. In addition, the authorization of the Land Commission to terminate certain traditional and customary uses was equally inconsistent with the constitutional mandate.

³¹⁰ See Chang, *supra* note 225, at 2 ("Hawai'i law has always incorporated traditional and customary law Thus, there is no question that the incorporation of Hawaiian values in the property law of this State has been the fundamental basis for the interpretation of property law.").

³¹¹ See HAW. REV. STAT. § 1-1 (subordinating English and American common law to traditional and customary usage).

³¹² *PASH*, 79 Hawai'i at 451, 903 P.2d at 1272.

³¹³ See *Relating to Land Use: Hearing on SB 8 Before the Senate Comm. on Water, Land and Hawaiian Affairs*, 19th Legis., 1st Reg. Sess. 9 (Haw. 1997)(testimony of Hayden Alului, Native Hawaiian rights attorney). Alului analogized traditional and customary rights to property interests, arguing that "[i]n its purported attempt to 'regulate' these native tenant and native Hawaiian rights, it [the legislative proposal] actually takes them by relegating them to mere privileges and/or licenses. And that is an unconstitutional taking." *Id.* There is currently an ongoing discussion on the status of traditional and customary rights. Neither the court nor the community decided whether to categorize these rights as "personal" or "property."

³¹⁴ HAW. CONST. art. XII, § 7.

³¹⁵ See *supra* notes 259-60 and accompanying text.

³¹⁶ *PASH*, 79 Hawai'i at 451, 903 P.2d at 1272.

The social and cultural impacts of SB 8's method of regulating traditional and customary uses were also administratively burdensome and expensive.³¹⁷ The fiscal and logistical burdens of administering the registration process are colossal if *every* Native Hawaiian registered *every* right that she or he exercises with respect to *every* piece of property affected. If each Hawaiian petitioned for five or ten uses, the Commission would have to adjudicate hundreds of thousands of contested case hearings. Should either the practitioner or landowner have had to appeal the Commission's decision to the courts through the Hawai'i Administrative Procedure Act,³¹⁸ this process of gaining "assurance of title" would be even more arduous.

It was also questionable whether the Land Commission was the proper body to adjudicate claims.³¹⁹ One of the Commission's directives is to "preserve, protect and encourage the development of land . . . for . . . uses for which they are best suited."³²⁰ Since SB 8 limited Native Hawaiian rights to undeveloped land, the registration and preservation of those rights would pose a serious conflict of interest for a Commission directed with facilitating development. At the February 4 hearing, Esther Ueda, Chair of the LUC, testified in opposition to SB 8, explaining that the Commission lacked the budget and expertise to adjudicate traditional claims.³²¹

Finally, the need to register all customary rights is questionable.³²² Not all landowners view traditional and customary rights as an encumbrance on title or wish to know what, if any, uses practitioners are exercising on their property. Instead of assuming the time and expense of the registration process proposed by SB 8, it is more appropriate to place the burden of establishing the non-existence of traditional and customary uses on landowners seeking such clarification.

2. HB 1920's judicial resolution of claims

House Bill 1920's creation of a judicial cause of action as opposed to a registration scheme, subjected it to the same constitutional challenges as SB

³¹⁷ See Holt-Takamine, *SB 8 Testimony*, *supra* note 238, at 1 (cautioning about excessive burden and expense).

³¹⁸ See *supra* note 181 for a description of HRS section 91.

³¹⁹ See *SB 8 Hearing*, *supra* note 225, at 2, (testimony of Denise Antolini, Casey Jarman, and Malia Akutagawa, Univ. of Haw. Envtl. Ctr., questioning the propriety of the Commission to adjudicate customary claims).

³²⁰ *Perry v. Planning Comm'n of County of Hawai'i*, 62 Haw. 666, 674-75, 619 P.2d 95, 102 (1980)(citing section 1 of Act 187: findings and declaration of purpose).

³²¹ See Ueda, *supra* note 300.

³²² See *HN 1920 Hearing*, *supra* note 237, at 2 (testimony of Kina'u Boyd Kamali'i, Native Hawaiian)(remarking that "legislative efforts to limit, restrict, or regulate the *PASH* ruling are premature and ill-advised").

8. Because HB 1920 empowered judges to issue decrees modifying and/or extinguishing traditional and customary practices if practitioners did not respond to newspaper notices, the bill contained due process violations similar to SB 8. However, the fact that HB 1920 charged circuit courts, as opposed to the Land Commission, with determining whether or not a right existed may have provided sufficient procedural safeguards to absolve the bill from procedural due process challenges. Nonetheless, the ability of the courts to modify or terminate rights could trigger the same takings claims discussed in relation to SB 8.³²³

Despite some similarities between the bills, this analysis must consider additional social impacts created by HB 1920.³²⁴ Because Native Hawaiians have the lowest socio-economic status of all ethnic groups in the state, most lacking even the financial resources to initiate and/or pursue a court action, HB 1920 disadvantaged Native Hawaiian petitioners and landowners of lower socio-economic status, and would have resulted in claims being settled by individuals who could afford to pursue traditional and customary rights as opposed to those who were entitled to them.

Senate Bill 8 and HB 1920's attempt to regulate the exercise of traditional and customary uses under Article XII, Section 7 was both legally and socially insufficient. Although the bills ostensibly sought to protect the exercise of traditional and customary rights while providing additional security for landowners, they resulted in the reduction or elimination of rights with negligible benefits. In light of the fact that the legislative backlash against *PASH* is likely to resume in future sessions, and that significant human and financial resources are necessary to pursue case-by-case determinations, an examination of two other bills introduced during the 1997 session provide examples of amenable alternatives.

³²³ The creation of a cause of action with such widespread application would also add to the already existing backlog in the courts. See *supra* text accompanying note 317.

³²⁴ See McGregor, *HB 1920 Testimony*, *supra* note 254, at 3. Professor McGregor also expressed concern that many Hawaiians who continue to exercise traditional customs would not complete the claims process and therefore would be disadvantaged:

Those persons who have continued to exercise Hawaiian custom and practices live on the margins of our society They continued to live in rural areas, fishing, hunting, gathering, and cultivating as their ancestors before them. They are mistrustful of outsiders. Many do not regularly read the paper. Some may not have telephones. This whole process would repeat the injustice of the Mahele back in 1848-50 when 72 percent of those eligible to be granted a land award failed to even petition for the lands upon which they lived and cultivated.

Id.

VI. EQUITABLE REGULATORY EFFORTS

Senate Bill 454 ("SB 454") and House Bill 1536 ("HB 1536") attempted to reconcile traditional and customary rights with contemporary land use through a public access provision and cultural impact statement. Instead of creating a system for defining and regulating current uses, both bills attempted to preserve existing rights where the status or use of land was about to be altered via State approval.

Senate Bill 454 proposed an amendment to HRS section 198-D, Hawai'i's statewide trail and access system.³²⁵ Hawai'i Revised Statutes section 198-D pertains to *Na Ala Hele*, a statewide board to manage all trails and accesses in the islands.³²⁶ The State Department of Land and Natural Resources is charged with coordinating and implementing the system, including acquiring both the property and easements necessary for public access.³²⁷

Senate Bill 454 proposed the addition of a new chapter conditioning any State or county-level land use approval on the provision of public access.³²⁸ Before amendments to district boundaries, development or community plans, zoning changes, permits, or use approvals could be granted, the agency would have had to "ensure that public access by right-of-way or easement was provided free and unimpeded to the shoreline, mountain, or other recreational, cultural, or natural resource."³²⁹ Public notice of the access and parking would also have been required.³³⁰

Senate Bill 454 provided a pragmatic approach to ensure access for both traditional and nontraditional uses. It complied with constitutional and statutory mandates while avoiding due process and equal protection challenges. By protecting uses as opposed to individuals, SB 454 also respected the Hawai'i Supreme Court's interpretation of HRS 1-1 without imposing standards on issues where the court reserved judgment, for example, the issue of which individuals are eligible to exercise protected uses under that statute.

This approach was also socially practical and less costly because it incorporated the access provision into an already existing system of review. Instead of requiring the registration or adjudication of all uses upon risk of extinguishment, this bill guaranteed public access when a landowner sought to change the current designation or use of a parcel. Such limited application allowed cooperative understandings between landowners and practitioners to

³²⁵ HAW. REV. STAT. § 198D-2 (1995).

³²⁶ *See id.*

³²⁷ *See id.* *See also id.* § 198D(8)-(9).

³²⁸ *See S. 454: Relating to Land Use*, 19th Leg., 1st Reg. Sess. (Haw. 1997).

³²⁹ *Id.* Section 2(a)-(b).

³³⁰ *See id.* Section 2(a).

remain intact and focused a community's time and resources on changes in existing relationships.

Finally, SB 454 was culturally appropriate because it declined to impose undue restrictions on the individuals entitled to continue traditional practices and the areas available for use. By protecting established "uses" as opposed to "users," this proposal provided the flexibility necessary for the continued evolution of Hawaiian culture in an evolving society.

A second alternative for protecting traditional and customary uses was the incorporation of cultural impacts into environmental assessments ("EA") and environmental impact statements ("EIS"). Hawai'i Revised Statutes section 343 provides a system of review to ensure that environmental concerns are adequately considered in agency decision making.³³¹ House Bill 1536 sought to amend HRS section 343 by adding Native Hawaiian culture and resources as a criteria for evaluating the social and environmental impacts of proposed actions requiring state or county approval, adoption, or funding.³³²

Hawai'i Revised Statutes section 343 requires state and county agencies to prepare an EA for proposed uses of state or county lands or funds, or uses proposed in conservation districts, shoreline areas, historic sites and other designated areas, with some exceptions.³³³ If, after making a written evaluation of the projected impacts of the use, an agency finds that the proposed action "may have a significant effect on the environment" the agency must prepare an EIS.³³⁴ If the agency finds that the proposal will not have a significant impact on the environment, an EIS is not required.³³⁵

An EIS is a comprehensive assessment of the environmental, social, and economic impacts of a proposed action, including methods to mitigate any adverse effects.³³⁶ Because acceptance of a final EIS is necessary for agency

³³¹ HAW. REV. STAT. § 343-1 (1995).

³³² See H.R. 1536: Relating to Native Hawaiian Cultural Impact Statements, 19th Leg., 1st Reg. Sess. (Haw. 1997). The Senate counterpart to HB 1536 was SB 1218. See also HAW. REV. STAT. § 343-5.

³³³ HAW. REV. STAT. § 343-5(a)-(b). This section requires environmental assessments for a proposed (1) use of state or county lands or funds (with some exceptions), (2) use of land in a conservation district designated by HRS section 205, (3) use within a shoreline area, (4) use in a historic site, (5) use within the Waikiki area of O'ahu, (6) amendments to existing county general plans resulting in designations other than agriculture, conservation or preservation, (7) reclassification of conservation land, or (8) construction or modification of helicopter facilities. *Id.* § 343-5(a). The public is allowed to review and comment on both a draft and final EA or EIS. See *id.* § 343-5(b).

³³⁴ *Id.* § 343-5(b). Although the agency responsible for approving, adopting, or funding a proposed use must complete the EA or EIS, the applicant usually completes the evaluations and submits them to the agency for approval. Telephone Interview with Jan Thirugnanam, Planner, Office of Environmental Quality Control (Oct. 3, 1997).

³³⁵ See *id.* § 343-5(c).

³³⁶ See *id.* § 343-2. Hawai'i Revised Statutes section 343-2 defines an EIS as an informational document which discloses the "environmental effects of a proposed action, effects

funding or approval,³³⁷ the criteria used in evaluating a proposed use directly impacts an agency's approval or rejection of that application. If the legislature had adopted HB 1536, agencies would have been required to consider the impacts of all actions requiring an EA or EIS on Hawaiian culture and resources as part of the environmental review process.

House Bill 1536 would have been effective in preserving both customary uses and the resources necessary to continue those practices. This bill therefore comported with Article XII, Section 7 and HRS 1-1's protection of custom. House Bill 1536 was also socially appropriate in the sense that it incorporated an examination of protected uses into an existing process structured to assess the social and environmental effects of proposed actions. Like SB 454, HB 1536 initiated review only at the behest of a landowner seeking to change an existing use or designation. This provision allowed for some community self-regulation while ensuring protection of traditional and customary uses. Finally, HB 1536 was culturally appropriate because it protected established uses without imposing undue restrictions on the practitioner's ethnicity and residency.³³⁸

Both SB 454 and HB 1536 presented workable alternatives for complying with the State's statutory and constitutional protections for traditional and customary uses. They are not perfect solutions, as communities will ultimately have to come together and address the needs and concerns of both practitioners and landowners in their own contexts. Senate Bill 454 and HB 1536 do, however, represent alternative legislative methods of addressing issues relating to traditional and customary rights while minimizing social and cultural impacts and without circumventing years of carefully developed judicial precedent.

of a proposed action on the economic and social welfare of the community and State, effects of the economic activities arising out of the proposed action, measures proposed to minimize adverse effects, and alternatives to the action and their environmental effects." *Id.* An EIS must also comply with rules adopted by the State Office of Environmental Quality Control *See* HAW. ADMIN. R. § 11-200 (1996) *See also* HAW. REV. STAT. § 343-2. An EIS is much more detailed than an EA.

³³⁷ *See id.* § 343-5(c).

³³⁸ After the Hawai'i Supreme Court decided *PASH*, the Office of Environmental Quality Control ("OEQC") an agency responsible for overseeing administration of HRS section 343, promulgated draft rules including provisions for cultural impact statements similar to those proposed by HB 1536. Telephone Interview with Jan Thirugnanam, Planner, OEQC (Oct. 3, 1997). However, Governor Ben Cayetano refused to approve the draft rules on the grounds that the legislature was the appropriate body to address the issue. *See id.* After the legislature failed to take action on the issue for the second year in a row, OEQC decided to take advisory action and released a guideline for assessing cultural impacts in September, 1997. *See id.* The OEQC accepted public comments on the draft guidelines until October 8, 1997, and was expected to release the final guidelines shortly thereafter. *See id.*

VII. CONCLUSION

The regulatory efforts presented in SB 8 and HB 1920 fell short of the legal standards established by Article XII, Section 7 of the State Constitution, and HRS 1-1 and 7-1. Legislative attempts to clarify and regulate traditional and customary uses through both bills substantially deviated from both the historical background and contemporary practice of those rights. In addition, the bills application of private property concepts did not adequately consider Hawai'i's unique history or its concepts relating to land tenure and property ownership.

Both bills viewed traditional and customary rights as an encumbrance on title. This characterization was unjustified in light of the Hawai'i Supreme Court's ruling that the "issuance of a Hawaiian land patent confirmed a limited property interest as compared with typical land patents governed by Western concepts of property."³³⁹ The court's conclusion that the "Western concept of exclusivity is not universally applicable in Hawai'i"³⁴⁰ further diminished the legitimacy of any State objective in promulgating SB 8 or HB 1920.

Because a landowner's ability to exclude others from its property was never firmly established in Hawai'i, SB 8 and HB 1920 attempted to address an issue that Hawai'i's courts and legislature had already resolved. Although access for traditional and customary uses may conflict with some landowner's misconceptions of what their rights are, such contentions are based on personal and intellectual philosophies, not on legal rights.

Instead of regulating traditional and customary uses, a more effective approach to calming the backlash may be to educate landowners about what certificates of title in Hawai'i actually convey. This is not to suggest that traditional and customary uses are beyond all regulation, or that landowners are unjustified in feeling upset if they are mistaken. This Comment merely proposes that title holders recognize the established limitations to land patents in Hawai'i, and stop fueling the backlash against *PASH*.

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³³⁹ Public Access Shoreline Hawai'i v. Hawai'i County Planning Comm'n, 79 Hawai'i 425, 447, 903 P.2d 1246, 1268 (1995).

³⁴⁰ *Id.*

³⁴¹ Class of 1998, William S. Richardson School of Law. *Mahalo nui* to Kahikukala Hoe, for his unwavering support and *aloha* as well as assistance with translations, research, and editing. *Mahalo no ho'i* to Isaac Moriwake, N. Lehua Kinilau, Brian Nakamura, and Denise Antolini for editorial and ideological support. Any errors are the author's alone.

